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SUPREME COURT, U. S.
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IN THE

# Supreme Court of the United States

October Term, 1967.

No. 528

MARION J. BERGUIDO, Individually, MARION J. BERGUIDO, ROBERT G. ROWE and WARREN H. WOODRING, Executors of the Estate of CARLOS BERGUIDO, JR., and JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO and CARLOS BERGUIDO, 3rd, by Their Guardian, MARION J. BERGUIDO,

*Petitioners,*

*v.*

EASTERN AIRLINES, INCORPORATED,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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# INDEX.


| | Page |
|---|---|
| OPINIONS BELOW | 2 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 3 |
| THE STATUTES INVOLVED | 4 |
| STATEMENT OF THE CASE | 8 |
| REASONS URGED FOR GRANTING THE WRIT | 9 |
| I. The Scheme of the Warsaw Convention Is Absolute Liability Upon the Occurrence of a Crash, Damages for Which Are Subject to the Limitations Expressed in Articles 20, 21, and 22 if the Ticket Meets the Conditions of Chapter II, Article 3, § (1) and Is Properly Delivered | 9 |
| II. Negligence and Wilful Misconduct Are Irrelevant Concepts in an International Air Crash Law Suit Unless the Carrier Has Established a Proper Delivery of an Adequate Ticket in Full and Complete Compliance With Chapter II, Article 3 § (1) of the Warsaw Convention. | 10 |
| III. The Decision in the Instant Case Is in Conflict With Recent Cases Decided in the Second and Ninth Circuits and the English Courts | 11 |
| IV. An International Flight Ticket Is a Matter Governed by Contract Subject to the Regulations of the Several Articles of the Convention | 27 |
| V. The View of the Solicitor General as to the Lisi Litigation Relative to the Effect of Non-compliance With Chapter II, Article 3(1) of the Convention | 31 |

## INDEX (Continued).


| | Page |
|---|---|
| VI. Wilful Misconduct | 34 |
| Assuming Pro Arguendo Only That the Court Reject Our Contentions Relative to Chapter II, Article 3(2) of the Convention, Petitioner Contends That the Trial Judge Rendered "Clearly Erroneous" Findings of Fact, Based in Part on Erroneous Legal Rules and Found in Error That Petitioner Did Not Prove That the Carrier Was Guilty of Wilful Misconduct as Required by Article 25 | 34 |
| APPENDIX A—Counter Placard Giving "Advice to International Passengers on Limitations of Liability" in Use at Airline Counters From November 15, 1964 to May 13, 1966 | 51 |
| APPENDIX B—Tickets Involved Here | 52 |
| APPENDIX C—Opinion Sur Motion for Rehearing Court of Appeals | 57 |
| APPENDIX D—Judgment of the Court of Appeals | 61 |
| APPENDIX E—Order of Court of Appeals Sur Petition for Rehearing | 62 |
| APPENDIX F—Opinion of Court of Appeals | 63 |

## TABLE OF CASES CITED.


| | Page |
|---|---|
| Block v. Compagnie Nationale Air France, 229 F. Supp. 801 (D. C. N. D. Ga., 1964) | 22 |
| Citrolla v. Eastern Airlines, Inc., 264 F. 2d 815 (C. A. 3, 1959) | 47 |
| Eck v. United Arab Airlines, 15 N. Y. 2d 53 (1964) | 30 |
| Eiseman v. P. R. R., 151 F. 2d 222 (3rd Cir. 1945) | 47 |
| Enfield v. Stout, 400 Pa. 6 (1960) | 47 |
| Flying Tiger Line, Inc. v. United States, 170 F. Supp. 422 (Ct. Cl., 1959) | 23 |
| Galloway v. United States, 319 U. S. 372 (1943) | 46 |
| Glassman v. Flying Tiger Air Line, 9 Avi. 18, 295 (1966) U. S. D. C. N. Dist of Cal. | 24 |
| Grey v. The American Airlines, 227 F. 2d 282 (C. A. 2, 1955) cert. denied 350 U. S. 989 (1956) | 11, 25, 26, 32 |
| Henningsen v. Bloomfield Motors, Inc., 32 N. J. 358, 161 A. 2d 69, 75 ALR 2d 1 (1960) | 28, 29 |
| Klar v. H & M Parcel Room, Inc., 270 App. Div. 538, 61 N. Y. S. 2d 285 aff'd 296 N. Y. 1044 | 11 |
| Lachs v. Fidelity & Casualty Co. of New York, 306 N. Y. 357 (1954) | 29 |
| Lenox v. Greenwich Ins. Co. of N. Y., 165 Pa. 575 (1894) | 30 |
| Lisi v. Alitalia-Linee Aeree Italiane, 253 F. Supp. 237 (D. C. S. D. N. Y. 1966) | 14, 23 |
| Lisi v. Alitalia-Linee Aeree Italiane, 370 F. 2d 508 (1966) | 12, 13, 14, 23, 24, 25, 26, 27, 31, 32, 33, 34 |
| Long v. Union R. R. Co., 175 F. 2d 199 (C. A. 3, 1949) | 9 |
| Mertens v. Flying Tiger Lines, Inc., 341 F. 2d 851 (C. A. 2, 1965); cert. denied, 86 S. Ct. 38 (1965); rehearing denied, 86 S. Ct. 306 (1965) | 11, 23, 25, 26, 27, 28, 32 |
| Mobile Tankers Co. S. A. & Sacony Oil Co., Inc. v. Mene Grande Oil Co., 363 F. 2d 611 (C. A. 3, 1966) | 46 |
| Noel v. United Aircraft Corp., 342 F. 2d 232 (3rd Cir. 1964) | 46 |
| O'Donnell v. Elgin J & E Ry Co., 70 S. Ct. 200 (1949) | 9 |
| Ostrov v. Metropolitan Life Insurance Company, decided C. A. 3, June 27, 1967 | 31 |

## TABLE OF CASES CITED (Continued).


Page

Surgical Supply Service Inc. v. Adler, 321 F. 2d 536 (C. A. 3, 1963) ..... 41, 46

Tuller v. K. L. M. Royal Dutch Lines, 292 F. 2d 775 (C. A. D. C. 1961) ..... 47

S. D. N. Y. 1966) ..... 14, 23

U. S. v. Minker, 350 U. S. 179 (1956) ..... 12

United States v. U. S. Gypsum Co., 333 U. S. 364 ..... 46

Warren v. The Flying Tiger, Inc., 352 F. 2d 494 (C. A. 9, 1965) ..... 11

Westminister Bank v. Imp. Airways, Ltd., 2 All. E. R. 890 (K. B. 1936) ..... 11, 23, 24, 26, 27

Zumwalt v. Gardner, 160 F. 2d 298 (C. A. 8, 1947) ..... 9


## STATUTES AND AUTHORITIES CITED.


Page

c. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. § 1254(1) 2

Kessler, Contracts of Adhesion—Some Thought About Freedom of Contract, 43 Col. L. Rev. 629 (1943) ..... 29

Safety Appliance Laws of the United States, 45 U. S. C. A. 11 9

Sand, "Air Carriers' Limitation of Liability and Air Passengers' Accident Compensation under the Warsaw Convention", 28 J. Air L. & Com. 260, 262-263 (1962) ..... 26

Sincoff, "Absolute Liability and Increased Damages in International Aviation Accidents", 52 A. B. A. Journal, 1122, 1123 (December, 1966) ..... 26

Vold, Law of Sales (2d Ed. 1959, 447) ..... 29

Warsaw Convention, 49 Stat. 3000 ..... 3, et seq.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. .

MARION J. BERGUIDO, INDIVIDUALLY, MARION J. BERGUIDO, ROBERT G. ROWE AND WARREN H. WOODRING, EXECUTORS OF THE ESTATE OF CARLOS BERGUIDO, JR., AND JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO AND CARLOS BERGUIDO, 3RD, BY THEIR GUARDIAN, MARION J. BERGUIDO,

*Petitioners,*

*v.*

EASTERN AIRLINES, INCORPORATED,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

*To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Marion J. Berguido, individually, Marion J. Berguido, Robert G. Rowe and Warren H. Woodring, Executors of the Estate of Carlos Berguido, Jr. and June Berguido, Joy Berguido, Jill Berguido and Carlos Berguido, 3rd by their Guardian, Marion J. Berguido, by their attorneys, Richter, Lord, Cavanaugh, McCarty & Raynes, respectfully petition that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on June 9, 1967.

## OPINIONS BELOW.

The original opinion of the Court of Appeals in this case is reported at 317 F. 2d 628. The opinion of the Court of Appeals denying plaintiff's timely petition for rehearing from the original appeal is reported at 317 F. 2d 633. Circuit Judges Kalodner and Hastie dissented from the denial of said petition and Judge Kalodner filed his own dissenting opinion.

The opinion in this case is reported at 369 F. 2d 874 and the opinion on the petition for rehearing, decided June 9, 1967 is attached as Appendix C to this petition. This contains a one line per curiam affirmance and a dissent by Kalodner, J. and Staley, C. J. which discusses the issues.

## JURISDICTION.

The judgment of the United States Court of Appeals in the Third Circuit was entered on 23 day of November, 1966. Plaintiff's petition for rehearing in said Court was timely filed. Said petition was denied by an order of the court entered June 9, 1967 with Judges Kalodner and Chief Judge Staley dissenting. The jurisdiction of this Court is invoked under c. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. § 1254(1).

## QUESTIONS PRESENTED.

1. Does the failure of an airline to print in adequately informative, clear, proper, legible form its claim for limitations of damages following a crash in international flight as required by Chapter II, Article 3(1) of the Convention leave the carrier subject to the absolute liability imposed upon it by Chapter III, Article 17?

2. Where the carrier has failed to comply with Chapter II, Article 3(1) of the Convention as to the form and contents of the ticket or proper delivery of the same, does not the absolute liability imposed by Chapter III, Article 17 on the carrier remain in effect and are not the issues of negligence or wilful misconduct irrelevant as unreached?

3. Was not the ticket in the instant case in violation of the requirements of Chapter II, Article 3(1) of the Convention because of its miniscule illegible print and its failure to state the claimed monetary limitation of damages as well as to expressly note Jacksonville as one of the agreed stopping places?

4. Was not the finding of fact that jets were the cause of the crash "clearly erroneous" and untenable where it was based exclusively on proof by deposition and such evidence was vague, self contradictory and overwhelmingly disproved by official government records and the testimony of a host of impartial witnesses?

5. If this court decides that in this international flight crash the carrier is not entitled to the limitations of damages of Articles 20, 21 and 22 because it issued inadequate and defective tickets, should not this Court enter judgment for petitioner in the sum of $375,000 plus interest and costs where the trial judge without exception thereto found petitioner suffered damages in that amount?

## THE STATUTES INVOLVED.

The Warsaw Convention, 49 Stat. 3000, provides as follows:

### CHAPTER II

#### TRANSPORTATION DOCUMENTS

*Section I—Passenger Ticket*

*Article 3*

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

*Section II—Baggage Check*

*Article 4*

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The name and address of the carrier or carriers;

(d) The number of the passenger ticket;

(e) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(f) The number and weight of the packages;

(g) The amount of the value declared in accordance with article 22(2);

(h) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall nonetheless be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d), (f), and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

*Section III—Air Waybill*

## CHAPTER III

### Liability of the Carrier

*Article 17*

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

*Article 20*

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

*Article 21*

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

*Article 22*

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law

of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sum mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

*Article 25*

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

## STATEMENT OF THE CASE.

Carlos Berguido, Jr. was killed in the crash of an Eastern Airlines plane on December 21, 1955 in the vicinity of Imeson Airport, Jacksonville, Florida. We are now almost twelve years from that accident. The facts of the accident and the rulings of the trial judge of importance here are related at p. 34 et seq., *infra*. Of special importance is the admission by the carrier that it could not prove as required by Article 20, *supra*, at p. 6 that it had taken all necessary measures to avoid the damage or that it was impossible for it to do so. Trial Record (118a). We have seen in the wake of its wreckage, two mistrials, a jury verdict for the widow and children in the amount of $454,658; a reversal by the Court of Appeals for the Third Circuit on an evidentiary point remanding for a new trial; a petition for certiorari to the Supreme Court of the United States by present petitioner denied; a jury finding of no wilful misconduct; a reversal by the trial judge of the jury's verdict of no wilful misconduct; a petition for mandamus by present respondent to the Court of Appeals C. A. 3 denied; and most recently a judgment for the defendant by a trial judge sitting without a jury. There was then an affirmance by the Court of Appeals by a two-to-one vote and finally a denial of a Petition for Rehearing with two judges dissenting and writing an opinion where no opinion is written for the majority on the Petition for Rehearing, but merely a statement that the Petition for Rehearing is denied. This petition followed.

## REASONS URGED FOR GRANTING THE WRIT.

### I. The Scheme of the Warsaw Convention Is Absolute Liability Upon the Occurrence of a Crash, Damages for Which Are Subject to the Limitations Expressed in Articles 20, 21 and 22 if the Ticket Meets the Requirements of Chapter II, Article 3, § (1) and Is Properly Delivered.

The majority opinion 369 F. 2d 874 holds that even if the carrier violated Article 3(1) that:

> ". . . . Success of the latter argument would have removed the Convention defense of limited liability and allowed the suit to proceed to trial, *with the plaintiff's burden being merely to prove the negligence of the defendant, rather than wilful misconduct,* this approach being the appropriate substitute for appellant's urged absolute and unlimited liability without fault theory". (Emphasis supplied.)

With this view of the scheme of the Warsaw Convention petitioner violently disagrees. She disagrees that the appellant's position as to Article 3(1) is, that if it was violated she still could recover only if she also proved carrier negligence. Under no reading of the Convention nor the *ratio decidendi* of any case is negligence the basis of recovery in *international* air crash cases. The appellant's position has consistently been that she wins on proof of failure by the carrier to comply with Article 3(1) and that she need prove neither negligence nor wilful misconduct.[1] Only if this court holds that the ticket in fact complies with

1. Once the airline fails to comply with Article 3(1) the issue of negligence should never have been reached and certainly this case could not turn on it as the majority opinion rules. It is totally irrelevant. Indeed if the case were so charged to the jury it would be reversible error as it was held to be in cases under the Safety Appliance Laws of the United States, 45 U. S. C. A. 11 where, too, negligence is not a requirement to a recovery thereunder. In the case of *Long v. Union R. R. Co.*, 175 F. 2d 199 (C. A. 3, 1949) the 3rd Circuit so held. *Zumwalt v. Gardner*, 160 F. 2d 298, 304 (C. A. 8, 1947) and *O'Donnell v. Elgin J & E Ry Co.*, 70 S. Ct. 200 (1949) are in accord.

Article 3(1) does petitioner then need to prove wilful misconduct.

All of the discussion of the factual findings of the trial judge re negligence and wilful misconduct, *supra*, pales into meaninglessness for the majority opinion in this case demonstrates a complete failure to recognize that negligence vel non is a completely irrelevant consideration in this case in the posture in which it was as of the time of its submission to the trial judge for adjudication. For this is a case under the Warsaw Convention. And the carrier's ticket did not comply with Chapter II, Article 3(1). Petitioner therefore completely disagrees with the statement in the opinion by the majority that if the carrier failed to comply with Article 3(1) of the Convention that the plaintiff would still have *"the burden to prove the negligence of the defendant rather than wilful misconduct, this approach being the appropriate substitute for appellant's urged absolute and unlimited liability without fault theory"*. 369 F. 2d 879 (Emphasis supplied).

**II. A Passenger Need Not Prove Negligence or Wilful Misconduct Once He Has Established a Faulty Ticket Because the Carrier Violated Chapter II, Article 3, § (1).**

The Court of Appeals' conclusion that "an analysis of the question [of the extent of the carrier's liability on the Warsaw] does not support absolute unlimited liability as the scheme of the Convention" is in direct conflict with the opinion of this same court in this same case in the first opinion when the three judges held:

> ". . . the Warsaw Convention provides, inter alia, that the carrier is *absolutely liable* for all injuries where the accident causing the damage so sustained takes place on board the aircraft." 317 F. 2d 629. (Emphasis supplied.)

The opinion of the Court of Appeals in this case is in direct conflict with the Court of Appeals for the 2nd Circuit, which held:

". . . the scheme of the Warsaw Convention is pretty plain on its face. Chapter III is the one which concerns us here. *Article 17 imposes an absolute liability upon the carrier for all personal injuries regardless of fault . . .*" Per Medina, J. in *Grey v. The American Airlines,* 227 F. 2d 282, 285 (C. A. 2, 1955) cert. denied 350 U. S. 989 (1956). (Emphasis supplied.)

It is also in conflict with the Court of Appeals for the Ninth Circuit, which takes the same view of the Convention's scheme. *Warren v. The Flying Tiger, Inc.,* 352 F. 2d 494 (C. A. 9, 1965). See also *Klar v. H & M Parcel Room, Inc.,* 270 App. Div. 538, 61 N. Y. S. 2d 285 aff'd 296 N. Y. 1044.

The Court of Appeals decision in this case is also in conflict with *Westminister Bank v. Imp. Airways, Ltd.,* 2 All. E. R. 890 (K. B. 1936). That case also holds that there is absolute unlimited liability in a Warsaw case when the provisions of the Warsaw Convention relating to the providing of an adequate ticket are not met.

**III. The Decision in the Instant Case Is in Conflict With Cases Decided in the Second and Ninth Circuits and the English Courts.**

The opinion and conclusion of the Court in the instant case, when it decides that the plaintiff must still prove negligence even though an inadequate ticket not in compliance with the requirements of the Convention has been delivered, is in conflict with the opinion of the Court of Appeals for the Second Circuit in *Mertens v. The Flying Tiger Line, Inc.,* 341 F. 2d 851 (1965). In that case a unanimous court, per Marshal, J. decided that the carrier could not avail itself of the limitation of liability because there was an inadequate delivery of the ticket and held that the case would be sent back merely for a trial only on the issue of damages. Thus that Court decided that the absolute liability of the defendant had been established by the same

kind of ticket as confronted the trial judge here. The cases are therefore in stark conflict.

Since the Court of Appeals below failed to give effect to the inadequacy of the ticket and made available to the defendant the liability limitations of the Convention (Article 25), the decision in this case is directly contrary to the decision of the Court of Appeals for the 2nd Circuit in *Lisi v. Alitalia-Linee Aeree Italiane,* 370 F. 2d 508 (1966).

The case of *Alitalia-Linee Aeree Italiane v. Lisi* is now pending in this court as Docket No. 1169. The decision in the Court of Appeals (Second) in that case is in direct conflict with the disposition by the Court of Appeals (Third) on the very same issue presented in this case. For in *Lisi, supra,* the holding was that the carrier was *not* permitted to take advantage of the liability limitations of the Convention where it failed to deliver to a passenger a legible ticket that properly advised the passenger of the limitations. In this case, the disposition is that the carrier *was* allowed to take advantage of the limitations despite the fact that it delivered a woefully inadequate ticket much less legible and less informative than the *Lisi* ticket.

The dissenting opinion by Judge Kalodner on the Petition for Rehearing in the instant case joined in by Chief Judge Staley forceably points out this very conflict and concludes "the disposition made by this court at 369 F. 2d 874 in the instant case, is in conflict with that made by the 2nd Circuit [*Lisi*] and for that reason alone requires the granting of the Petition for Rehearing". The conclusion of this sentence may be paraphrased by saying that that reason alone requires the granting of the Petition for Certiorari. In accord *U. S. v. Minker,* 350 U. S. 179, 180 (1956).

The identical questions raised in this petition are now being raised by the carrier before the Supreme Court of the United States in the case of *Alitalia-Linee Aeree Italiane v. Lisi, supra.* That case was brought by the airline to the Supreme Court on an appeal from the decision of the Court of Appeals for the 2nd Circuit which appears

at 370 F. 2d (1966). In *Lisi* on pre-trial motion the ruling was as a matter of law that the carrier would not be permitted to take advantage of the liability limitations of the Warsaw Convention ($8300) because it had failed to deliver to the passenger a ticket that properly advised the passenger of such limitations sometimes available under Chapter III, Article 22(1) of that treaty, noted under the heading "Liability of the Carrier" because it had failed to comply with the requirements set forth under Chapter II, headed "Transportation Documents" which in Article 3(1) necessitate that a passenger ticket must contain certain specific data which the ticket involved in the *Lisi* case did not contain.[2] Nor did it till 1964 put in use on its counters placards, similar to App. A, p. 51, *infra*. In the instant case the ticket is even more violative than *Lisi* of the requirements of Chapter II, Article 3(1) "For the Transportation of Passengers the Carrier must deliver a Passenger Ticket which shall contain the following particulars". In addition to the violations noted in the *Lisi* case because of which the ticket was held inadequate in that it was virtually illegible

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2. Chapter II—Transportation Documents
Section I—Passenger Ticket—Article 3
(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
(a) The place and date of issue;
(b) The place of departure and of destination;
(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
(d) The name and address of the carrier or carriers;
(e) A statement that the transportation is subject to the rules relating to liability established by this convention.
(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

as well as uninformative of the nature of the proposed money limitation, the ticket here in *Berguido* failed to mention Jacksonville, the city where the plane was attempting to make a normal landing when it crashed, as one of the "agreed stopping places." This latter violation is of serious import because it substantially and proportionately increases the risk so greatly to the passenger. For it is a well recognized fact that most air crashes occur while a plane is taking off or landing and in this case the crash occurred while attempting to land on the runway. By making Jacksonville an additional stopping place, to which by contract the plaintiff's decedent had *not* agreed, the airline unilaterally increased the risk of harm to him by 33⅓% because the ticket only mentioned two stops on its way from Miami (Washington-Philadelphia) though indeed a third at Jacksonville was being made to which the plaintiff's decedent had not agreed nor been informed of and during which attempt the plane crashed. There was no proof that this was an emergency landing.

As stated, the form, context, size of print and the obscurity and difficulty in reading of the *Lisi* ticket and the instant Berguido ticket are identical with the exception of the fact that in the instant ticket, one of the stopping places (Jacksonville) was not mentioned. This ticket is even less informative.[3] If anything, the instant ticket contained even less about Warsaw's effect in the event of the passenger's death than the *Lisi* ticket did. The *Lisi* ticket at least warned the passenger, that ". . . in most cases—the Convention limits the liability of carriers for death or personal injury. . . ." 253 F. Supp. 242. Not even that legally inadequate warning was on the instant ticket.

We quote in full the *Lisi* opinion, 370 F. 2d 508 of the Court of Appeals through Kaufman, J. At page 511 et seq., it reads:

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3. See facsimile of instant tickets in Appendix B herewith attached. The Lisi tickets are set forth in the appendix to its District Court opinion at 253 F. S. 242.

"It is clear, however, that under other Articles of the Convention, these limitations on liability are not applicable if the carrier fails to deliver to the passenger a ticket or a check for baggage. These Articles, moreover, provide that the ticket and check shall contain certain specified information, including 'a statement that the transportation is subject to the rules relating to liability established by this convention.' *Thus, it would appear, that unless the carrier furnishes to the passenger a ticket or baggage check containing the appropriate statement, it may not restrict its liability as circumscribed by the Convention Articles.*

Alitalia responds, however, by arguing that there is a crucial difference in the language between Articles 3 and 4. While Article 4(4), it says, denies the carrier limited liability 'if * * * [it] accepts baggage without a baggage check having been delivered, *or if the baggage check does not contain the particulars*' (Emphasis theirs) the only ground stated in Article 3(2) for denying limited liability for the personal injuries or death of passengers, is the carrier's failure to deliver a ticket. Thus, we are asked to apply the principle *expressio unius est exclusio alterius* and to hold that failure to give notice on the passenger ticket that the flight is subject to the Convention's rules, will not deprive the carrier of the substantial delimitation of liability for personal injuries or death. All that is required, urges Alitalia, for this right to vest, is that a ticket be delivered to the passengers.

## II.

It is apparent that Alitalia relies on a literal reading of the Convention for its assertions. We reject the interpretation it urges upon us. While it is true that the language of the Convention is relevant to our decision, it must not become, as Justice Frankfurter stated it, a 'verbal prison.' *Sullivan v. Behimer*, 363 U.S. 335, 358, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960)

(Frankfurter, J., dissenting). The task of ascertaining the meaning of words is difficult, and one certain way of misinterpreting them is by a literal reading. As Learned Hand put it, 'words are such temperamental beings that the surest way to lose their essence is to take them at their face.' 1942 Address by Judge Hand to the Massachusetts Bar Association. Thus, the language of Article 3 cannot be considered in isolation; rather, it must be viewed in light of the other Articles and the overall purposes of the Convention. See *Eck v. United Arab Airlines, supra.*

This is not the first occasion on which we have been called upon to interpret the language of the Convention's delimiting provisions. For example, in *Mertens v. Flying Tiger Line, Inc.*, 341 F. 2d 851 (2d Cir.), cert. denied, 382 U. S. 816, 86 S. Ct. 38, 15 L. Ed. 2d 64 (1965), we were asked to decide whether presenting a ticket to a passenger after he boarded the carrier's plane, constituted a 'delivery' within the meaning of Article 3(2). We stated:

We read Article 3(2) to require that the *ticket be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability.* Such self-protective measures, could consist of, for example, deciding not to take the flight, entering in a special contract with the carrier, or taking out additional insurance for the flight. The Convention specifically provides that 'the carrier and the passenger may agree to a higher limit of liability' (Article 22(1)) and there would be little reason to make this provision, to require that the ticket state that the liability of the carrier is limited (Article 3(1)(e)), and to require that such a ticket be delivered to the passenger unless the Convention also required that the ticket *be delivered in such circumstances as to afford the passenger a reasonable opportunity to take these self-protective measures.'* Id. at 856-857 (Emphasis added.)

We held, accordingly, that the delivery was inadequate, and the Convention's fixed limits of liability were not available.

Later, a similar result was reached by the Ninth Circuit in *Warren v. Flying Tiger Line, Inc.*, 352 F. 2d 494 (1965). There the passenger was given a 'boarding ticket' or 'pass' at the foot of the ramp leading to the aircraft. The Court decided that the 'delivery' must be made sufficiently in advance so that the passenger will have the opportunity to take self-protective measures, such as purchasing additional insurance if he so chooses. The 'delivery' of a boarding ticket at the foot of the ramp as the plane was about to depart, did not suffice therefor. The carrier, accordingly, was barred by Article 3(2) from availing itself of the Convention's liability limitation provisions.

We believe that the reasoning of the Mertens and Warren decisions is apposite to the case now before us. The Convention's arbitrary limitations on liability—which have been severely and repeatedly criticized—are advantageous to the carrier. **But the quid pro quo for this one-sided advantage is delivery to the passenger of a ticket and baggage check which give him notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially.** Thus the passenger is given the opportunity to purchase additional flight insurance or to take other steps for his self-protection as he sees fit. (Double emphasis ours.)

This notice to passengers is especially important in this country where the overwhelming number of people who travel by air do so on domestic flights, for which the Convention's restrictions on liability are inapplicable. It is too much to expect these passengers to be sufficiently sophisticated to realize that although they are traveling the same number of miles on an international flight that they have fre-

quent traveled domestically, the amount they may recover in the event of an accident is drastically reduced. In short, it is clear from the *ratio decidendi* of the Mertens and Warren cases, that the inquiry that must be made if the Convention's Articles are to be given meaning, is '[w]hether the ticket was delivered to the passenger in such a manner as to afford him a reasonable opportunity to take self-protective measures * * *'. *Mertens v. Flying Tiger Line, Inc., supra,* 341 F. 2d at 857.

III.

We proceed to determine, therefore, whether the particular tickets and baggage checks involved in the present case gave the appellees adequate notice. On the front of the ticket and baggage check, in exceedingly small print, was the following message: 'Each passenger should carefully examine this ticket, particularly the Conditions on page 4.' And, at this point, we note that one of our reasons in *Mertens v. Flying Tiger Line, Inc., supra,* for precluding the carrier from limiting its liability under the Convention was that the required statement on the ticket 'was printed in such a manner as to virtually be unnoticeable and unreadable * * *.' Id., at 857.

*Judge McMahon appropriately characterized the 'notice' to the passengers in his pithy conclusion as 'camouflaged in Lilliputian print in a thicket of 'Conditions of contract'* * * *. Indeed the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that they are so artfully camouflaged that their presence is concealed.'* 253 F. Supp. at 243. Accord, *Warren v. Flying Tiger Line, Inc., supra,* 352 F. 2d at 497. But see *Seth v. British Overseas Airways Corp.,* 329 F. 2d 302 (1st Cir.), cert. denied, 379 U. S. 858 85 S. Ct. 1-4, 13 L. Ed. 2d 61 (1964).

> We agree that a jury could not reasonably have found that the tickets and baggage checks gave the passengers the required notice. The District Court properly granted partial summary judgment striking out these affirmative defenses of appellant." (Emphasis ours.)
>
> Affirmed.

And so the Court held as a matter of law.

To these views former Chief Judge Kalodner subscribed in his dissent in the instant (*Berguido*) case (369 F. 2d 874, 885 et seq. 1966) and repeated same in his dissenting opinion filed in response to petitioner's petition for rehearing in the Court of Appeals, decided 377 C. A. 3, — F. 2d —, decided June 9, 1967, in which he was joined by Chief Judge Staley.

The exact *opposite* view was expressed by Forman, J. for the majority below in the instant case. 369 F. 2d 874, 878 (1966):

> ". . . Appellant urges a theory of unlimited absolute liability in the face of the appellee's alleged failure to comply with Article 3(1) of the Convention. It is argued that Article 17 provides for unlimited absolute liability unless a *carrier* proves that it has complied with Article 3(1). Appellee, urges appellant, having failed to carry its burden of proof is, as a matter of law, liable without fault for the total amount of appellant's damages, under Article 17 of the Convention. Specifically, appellant contends that appellee has failed to prove both actual delivery of the ticket to the decedent and actual delivery of an *adequate* ticket showing (1) all agreed stopping places and (2) the provisions of the Convention which limit a carrier's liability. Although appellant's contention is that the burden of proof is on the carrier, an attempt is also made by appellant to affirmatively show the inadequacy of the ticket, although not the failure to actually deliver that ticket. However, failing acceptance of this

approach, appellant urges that the District Court's finding of no wilful misconduct by the appellee was clearly erroneous.

Appellee contends that the issue of compliance with Article 3(1) of the Convention was eliminated from the case at pre-trial and that, nevertheless, a plaintiff, and not a carrier-defendant, has the burden of proving non-compliance with Article 3(1). Actual non-delivery of the ticket under Article 3(2) is also urged as the only Article 3(1) conduct of a carrier which will defeat the Convention as a defense. As to the question of wilful misconduct, appellee urges that there was substantial basis for the District Court's exonerating it therefrom. Appellee furthermore cross-assigns as error the District Court's grant of the motion for a new trial subsequent to the jury verdict in its favor at the fourth trial, which resulted in the fifth trial from which this appeal has been taken.

The contentions thus having been outlined, we now turn to their disposition.

[5] Appellant has urged that both Grey v. American Airlines and Westminster Bank v. Imp. Airways, Ltd. stand for the proposition that liability under Article 17 of the Warsaw Convention, as an initial matter, is absolute and unlimited. To avoid such liability, a carrier must demonstrate compliance with Article 3(1) of the Convention, argues appellant. Neither case supports the proposition, for the question of whether Article 17 provides such *unlimited* absolute liability for the death of a passenger was not an issue therein. . . . Article 17 itself gives no indication of the extent of a carrier's liability. It must be read with Article 22(1) for the question concerning the extent of the liability to be answered, and an analysis of the question does not support absolute *unlimited* liability as the scheme of the Convention."

We respectfully submit that the decision in the 2nd Circuit is absolutely correct—that the decision of the majority in the instant case is without doubt in error. It is our contention that Warsaw does in fact impose absolute and unlimited liability.

At page 879 of the opinion in the instant case the majority states:

> ". . . an analysis of the question [of the extent of a carrier's liability under Warsaw] does not support absolute unlimited liability as the scheme of the Convention."

This is error. That is precisely what the scheme of the Convention is. The defendant itself conceded at the trial of this case that liability under Warsaw is automatic. Its counsel told the trial court:

> ". . . carriers are automatically liable for injury or death occurring in a crash." (118a)

In its first opinion herein, the Court of Appeals, 317 F. 2d 628, 629 held:

> "The Warsaw Convention provides, inter alia, that the carrier is *absolutely* liable for *all* injuries where the accident causing the damage so sustained takes place on board the aircraft." (Emphasis supplied.)

The Court of Appeals for the Second Circuit has held that that is the scheme.

> "The scheme of the Warsaw Convention is pretty plain on its face. Chapter III is the one which concerns us here. Article 17 imposes an *absolute* liability upon the carrier for *all personal injuries regardless of fault* . . ." per Medina, J. in Grey v. American Airlines, 227 F. 2d 282, 285 (C. A. 2, 1955); cert. denied, 350 U. S. 989 (1956). (Emphasis supplied.)

The Court of Appeals for the Ninth Circuit takes the same view of the Convention's scheme. *Warren v. Flying Tiger Line, Inc.*, 352 F. 2d 494 (C. A. 9, 1965). See also:

*Block v. Compagnie Nationale Air France,* 229 F. Supp. 801, 805 (D. C. N. D. Ga., 1964).

English decisional law reads the scheme of this uniform international Convention exactly the same way:

> "The effect of the articles above-mentioned [dealing with carriage of goods under the Convention] is, in my opinion, *prima facie,* to render the carrier . . . liable for *any loss* of goods caused or occasioned during carriage by air." Per Lewis, J. in Westminster Bank v. Imp. Airways, Ltd., 2 All. E. R. 890, 895 (K. B. 1936)."

Thus, the Court of Appeals' initial opinion states that the carrier is absolutely liable for all injuries. Grey holds it absolutely liable for all personal injuries regardless of fault. Westminster holds it prima facie liable for any loss. There should be no question that the scheme of Warsaw is one of absolute, unlimited liability. The language in these decided cases could not be clearer. Yet the Court of Appeals (C. A. 3) has held the reverse here.

Westminster and Grey are completely consistent in their understanding of the scheme of Warsaw. The majority's attempted distinction of Westminster on grounds that it was not a passenger case is indefensible. Grey was a passenger case. The scheme of the Convention—initially absolute and unlimited liability—applies uniformly to goods and passengers.

The reasons of policy which support such an accurate construction is perfectly clear. To state it is to underscore the first error of the majority in its opinion. The drafters of the Convention intended to encourage the growth of what more than three decades ago was an infant industry. They did so by designing a scheme which created absolute, unlimited liability from which the carriers got the economically extraordinary opportunity to exclude or limit their exposure to damages. They could realize such exclusion or limitation if, but only if, they first properly delivered adequate notice to shippers and passengers that such exclusion

or limitation existed, so that shippers and passengers would have a fair chance to take steps to protect themselves economically against the Convention's potentially radical limitation or exclusion of damages. *Flying Tiger Line, Inc. v. United States,* 170 F. Supp. 422, 424 (Ct. Cl., 1959) and *Lisi, supra,* at 253 F. Supp. 239. The opinion of the Court of Appeals of the 2nd Circuit in *Lisi, supra,* makes this expressly clear.

Warsaw itself provides that if a carrier does not deliver a ticket to a passenger, it may not avail itself of any exclusions or limitations of the treaty. Article 3(2). Decisional law has held that there must be a proper delivery of the ticket. *Mertens v. Flying Tiger Lines, Inc.,* 341 F. 2d 851 (C. A. 2, 1965); cert. denied, 86 S. Ct. 38 (1965); rehearing denied, 86 S. Ct. 306 (1965), *Warren v. Flying Tiger Line, Inc., supra,* and that there must be an adequate ticket, *Lisi v. Alitalia-Linee Aeree Italiane,* 253 F. Supp. 237 (D. C. S. D. N. Y. 1966).

What are the legal consequences if the carrier does not properly deliver an adequate ticket? Both decisional law and the commentators answer that question very clearly. In *Westminster, supra,* Lewis, J. held at 2 All. E. R. 895:

> ". . . in order to enable the carrier to so exclude or limit his liability he must comply with art. 8(a) to (i) inclusive and (q). . . ." (which specifies every item which must be declared on the waybill).

The *Westminster* waybill did not contain such particulars, and by operation of Article 9 the carrier was denied the right either to exclude or limit its liability. *The court gave judgment for the full amount of goods in question.* Let it be noted that while plaintiff there pressed three theories —the deficiency of the waybill, the carrier's negligence, and the carrier's wilful misconduct—the last two were never reached by the court. Its judgment rested squarely and solely on the fact that Warsaw's initially absolute,

unlimited liability was never removed because the carrier never did what was necessary to exclude or limit its liability—deliver a proper waybill.

What happened under the goods situation in *Westminster* has an exact parallel in the Convention's provisions for the passenger situation. That is this case. It is *Mertens.* It is *Lisi.* It is *Warren.* They are all passenger cases.

Having found an inadequate ticket under Article 3, *Lisi* ruled at pages 239-240:

> ". . . defendant cannot exclude or limit its liability under the Convention in the case at bar."

and at page 243:

> ". . . the challenged affirmative defenses are unavailable to defendant in these actions."

Having found inadequate delivery of a passenger ticket under Article 3, *Mertens* held unanimously at page 856:

> ". . . as a matter of law the delivery of the ticket was not adequate and that the limitation on damages of the Convention is inapplicable."

The case was remanded for trial solely on the issue of damages.

In the history of *Warren, supra,* is the clinching demonstration of what must be done here. At the first trial of *Warren,* the District Court found that Warsaw applied; there was an effective delivery of the ticket, and that, therefore, the plaintiffs were limited to recovery of $8,300.00, 234 F. Supp. 223 (D. C. S. D. Cal., 1964). The Court of Appeals for the Ninth Circuit reversed, holding that Article 3(1) had not been satisfied, and remanded for further proceedings. 352 F. 2d 498.

Following the remand, the United States District Court for the Northern District of California very recently retried Warren under the title of *Glassman et al v. Flying Tiger Line,* 9 Avi. 18, 295 (1966), as it was one of the actions

included in the group of cases decided *eo nomine Warren, supra.* It applied *Warsaw* and held:

> "The scheme of the Convention is plain on its face. *Grey v. American Airlines,* 227 F. 2d 282 (2d Cir. 1955), cert. denied 350 U. S. 989. *Article 17 imposes absolute liability irrespective of fault and because carrier accepted decedents as passengers without tickets having been delivered in the manner contemplated by Article 3(1), Article 3(2) deprives it of the right to limitation granted by Article 22(1), Warren v. Flying Tiger Line, Inc.* [9 Avi. 17,848] 352 F. 2d 494 (9th Cir. 1965), and the right exculpation allowed by Article 20(1). Even if it be assumed that carrier is entitled to claim the benefit of Article 20(1) the court finds that it has not met the almost insurmountable burden required of it. *Grey v. American Airlines, supra.*" (Emphasis supplied.)

Thereafter the carriers did no longer appeal.

Be it noted that *Lisi* granted partial summary judgment denying the carrier its Warsaw defenses and was affirmed at 370 F. 2d 508 (1966). By like token, the Warsaw defenses removed in *Lisi, Mertens and Warren* must be removed here. The remand in *Mertens* points the way. The retrial in *Warren* proves it. The remand here should decree entry of judgment for damages of $375,000 already found by the trial judge plus costs and interest especially since the carrier admitted (118a) it could not prove that it took all necessary measures to avoid the damage or that it was impossible for it to do so. Art. 20(1).

The majority recognizes that *Mertens, Grey* and *Lisi* discuss the legal ramifications of the failure to comply with Article 3(1) (p. 10, fn. 17). But the majority shied away from a discussion of what those ramifications are. We submit *Mertens, Lisi* and *Grey* cannot be read any way other than that the failure to deliver an adequate ticket dispositively fixes the absolute, unlimited liability which the Convention initially creates. *Warren* and *Lisi* both now prove that.

The commentators confirm the operation of Warsaw so clearly announced by *Grey, Westminster, Lisi Mertens* and *Warren.*

> "[The Convention] renders the carrier liable *without* limitation if it fails to issue the proper 'Warsaw' passenger ticket (Article 3, paragraph 2) . . ." (Emphasis supplied.)

Sand, "Air Carriers' Limitation of Liability and Air Passengers' Accident Compensation under the Warsaw Convention", 28 J. Air L. & Com. 260, 262-263 (1962). So too, we find the following statement by Sincoff, "Absolute Liability and Increased Damages in International Aviation Accidents", 52 A. B. A. Journal, 1122, 1123 (December, 1966):

> "Article 3 states that the carrier must deliver a ticket to the passenger. Absent delivery, the carrier is deprived of the benefits of Articles 20, 21 and 22, which exclude or limit liability. In addition, Article 3 requires that the ticket contain a specific statement that the transportation is subject to the liability provisions of the treaty. The obvious purpose of such a statement is to give the passenger notice of the limitation and afford him the opportunity of protecting himself by obtaining accident insurance. Courts have therefore held that a carrier is liable as a matter of law for the actual damages sustained if the ticket is delivered when the passenger is aboard [citing Mertens] or about to board the aircraft, [citing Warren] or if the ticket is unreadable due to Lilliputian-size print. [citing Lisi]."

Despite the clear design of the Convention, and despite *Westminster, Lisi, Mertens* and *Warren,* and the writers on the subject, the majority below in our case held:

> "The District Court . . . as well as finding that appellee was not guilty of wilful misconduct, found that appellee was not even negligent. If this conclusion

is supportable, it is final and *there is no need for us to examine appellant's legal contentions concerning Article 3(1) of the Convention,* which we have set forth in the foregoing paragraph, *for even if those contentions are determined in favor of appellant, they would not dictate a reversal.*" (at 10) (Emphasis supplied.)

This is putting the cart before the horse. We respectfully submit that here lies the manifest error of the majority's opinion. It is error on which the entire result pivots, for if our contentions are accurate—and all of the authorities we have just discussed demonstrate they are—then reversal is exactly what *is* dictated and the questions of negligence and wilful misconduct are no more involved and can no more be reached here than they could in *Westminster, Lisi, Mertens* and *Warren. They are utterly irrelevant.*

The striking fact and law of this matter is that the very contentions which we have urged here were the bases upon which *Westminster, Lisi, Mertens* and *Warren* were decided, and yet the majority here has expressly stated that:

> "... there is no need for us to examine [those] ... contentions ..."

We stated at the outset of this petition that the majority has either failed to apply the authority which rules this case, or has so applied it as to throw it into conflict with decisional law. We respectfully submit that the foregoing discussion amply documents that statement.

## IV. An International Flight Ticket Is a Matter Governed by a Contract Subject to the Regulations of the Several Articles of the Convention.

We submit that an airline transports a passenger by virtue of the contract that it makes with him—whether the flight is domestic or international. All that the Warsaw Convention allows the airline to do is limit its liability if

it does so in full accordance with the principles of law applicable to the limitation of liability in any contract. In the instant case the defendant never proved that it abided by the conditions necessary to limit its liability under contract principles.

Contract principles make clear that limitations of damages of the Warsaw Convention did not bind the plaintiff's decedent since the amount of the limitations were not printed on the ticket and because whatever mention there was of reference to the Warsaw Convention was in extremely tiny print at the bottom of the ticket. See *Mertens, Admr. v. Flying Tiger Lines, Inc.*, 341 F. 2d 851, 857.

Plaintiff's decedent was safely transported from Philadelphia to San Salvador and then from San Salvador to Miami by Pan American. Hours later he took this purely domestic fatal Eastern Air Lines flight to Washington. He got no discount for buying the tickets all at one time. He could have bought his ticket for Washington in Miami and avoided the cloud of Warsaw. That he did not justifies the conviction that these meaningless words at the bottom of the ticket communicated nothing to him. Defendant did not prove decedent's awareness of the clause. Even if readable, the words on the ticket make no explanation of the limitation, do not state the amount of the limitation and indeed are misleading for they refer to the rules of international flight. To any reader this flight from Miami to Philadelphia on a local plane was not international in character. We submit under simple contract principles this attempted limitation was void and a nullity as a matter of law.

In a landmark decision, *Henningsen v. Bloomfield Motors, Inc.*, 32 N. J. 358, 161 A. 2d 69, 75 ALR 2d 1 (1960), the Chrysler Corporation had printed in similar fine print a limitation of liability relative to warranties pertaining to an automobile sold to the plaintiff there. In similar fine print there was the phrase "I have read the matter printed on the back hereof and agree to it as part of this order, as if it were printed above my signature. I certify that I am

21 years of age, or older, and hereby acknowledge receipt of a copy of this order." In the instant case, as in *Henningsen,* the phrases in question were the least legible but the most important in evaluating the rights set forth in the instrument. The court held the claimed limitation of liability ineffective.

In *Henningsen* Justice Francis found that the gross inequality of bargaining position occupied by the consumer in the automobile industry is quite apparent. How much truer is this in the case of a public transportation system such as an airline. Perhaps the most telling sentence in *Henningsen* is this (32 N. J. 396):

> "It is not enough merely to show the form of a contract; it must appear also that the agreement was *understandingly* made." (Emphasis supplied.)

Recent law review articles have subscribed wholeheartedly to this view. See *Kessler, Contracts of Adhesion —Some Thought About Freedom of Contract,* 43 Col. L. Rev. 629, 632 (1943). See also Vold, *Law of Sales* (2d Ed. 1959, 447), which recognizes the unequal positions of buyer and seller, particularly of public services such as "transportation."

In *Lachs v. Fidelity & Casualty Co. of New York,* 306 N. Y. 357 (1954) similar finely printed, uninformative legends were to be found on the policy. The Court held the fine print describing the kind of airline to which it was limited could not deprive the insurance purchaser of coverage on this non-scheduled airline flight. This was not a suprising decision. No *affirmative* assent to the fine print was proven. As was noted in that opinion, *average people* who buy tickets or insurance *"are not expected to carry the Civil Aeronautics Act or the Code of the Federal Regulations when taking a plane."* (Emphasis supplied.)

To admit that older cases interpreted the treaty strictly and against the passenger is no more than to say that such strictness existed only because the airlines were in their infancy. The Convention's principle "was one of allowing

only a regulated burden to be the responsibility of the then struggling carriers." *Eck v. United Arab Airlines,* 15 N. Y. 2d 53, 59 (1964). Now, as this Court well knows, the whole picture has changed profoundly. And with this change the courts should limit the application of this harsh law and require carriers to make the paying public meaningfully aware of the situation as a precondition to limiting their liability.

The New York Court of Appeals in *Eck v. United Arab Airlines, supra,* after stating in footnote 2 (p. 59):

> "2. When the Convention was originally drafted in 1926, Charles Lindbergh had not flown to Paris. When it was first adopted Air France had two overseas flights, one from Paris to London and the other from Marseilles to Tunis. Pan American flew from Key West to Havana. The China Clipper flight on Pan American did not take place until 1935, after the United States had become a signatory to the Warsaw Convention in 1934."

adopted the philosophy that the treaty must be interpreted in the light of the present circumstances of the airline industry. If this Court follows this sound philosophy, the limitations of Article 25 of the Warsaw Convention clearly should not be permitted to attach to the present case.

This principle in respect to the necessity for printing a ticket properly in adequate size so that it can be easily read and understood is not novel in the law. In Pennsylvania this principle was adopted as far back as *Lenox v. Greenwich Ins. Co. of N. Y.,* 165 Pa. 575, 577 (1894), in an insurance policy case where the court said:

> " 'It is well known that the evil aimed at in this legislation was the custom of insurance companies to put in their blank forms of application long and intricate questions or statements to be answered or made by the applicant, printed usually in very small type, and the relevancy or materiality not always apparent

to the inexperienced, and therefore liable to become traps to catch even the innocent unwary. *The general intent was to keep these statements before the eyes of the insured, so that he might know his contract, and if it contained errors, have them rectified before it became too late.'* This has since been quoted with approval. See, e.g., Muhlenberg v. Mutual Fire Insurance Company of Sinking Springs, 211 Pa. 432, 433-434, 60 A. 995. As the statute was passed in the interest of fair dealing, its provisions must be strictly complied with in all respects: Ellis v. Metropolitan Life Insurance Company, 228 Pa. 230, 231, 77 A. 460." (Emphasis supplied.)

This was restated in *Ostrov v. Metropolitan Life Insurance Company,* decided C. A. 3, June 27, 1967, as an accurate controlling guide in these cases.

We respectfully submit that a perusal of the tickets which appeared as Exhibit 12 in the trial before Judge Boldt Appendix B here demonstrates beyond question that they are deficient in that they are comparatively illegible and fail to set forth adequately the proposed claim for limitation of liability allowed under the Convention if there is to be compliance with Chapter II, Article 3(1). We respectfully submit that the cases and the authorities mentioned in this brief, *supra,* establish that the ticket here and in *Lisi* were deficient and that therefore the decision in the 2nd Circuit in the Court of Appeals in *Lisi, supra,* is correct and the decision in the instant case in the 3rd Circuit is erroneous.

## V. The View of the Solicitor General as to the Lisi Litigation and the Effect of Non-compliance With Article 3(1) of the Convention.

This court made inquiry of the view of the Solicitor General as to the significance of the tickets in the *Lisi* litigation. It received from the Solicitor General an expression of approval of the decision of the Court of Appeals for the 2nd Circuit in that case. He saw no necessity

for a hearing before this court and therefore made a recommendation of denial of certiorari.

The Solicitor General considers the requirement that tickets be printed in proper size, form and degree of legibility to make them easy to read and comprehend as well as to contain in them adequate explicit information in respect to limitations claimed as set forth in *Mertens* and *Warren* and *Lisi* to be the exercise by those courts of "a proper performance of the judicial duties of the courts of contracting states to implement the broad visions of the Convention" (P. 7, Solicitor General's brief). The Solicitor General also approves of the view of the courts in these cases *rejecting* strict literalism and interpreting Articles 3 and 4 of the Convention to require full and revealing notice in readable form. Otherwise Article 3(1) would be purposeless and meaningless. This discussion arose when the airlines contended that since Article 4 which relates to baggage expressly required that the ticket must contain certain particulars, in the absence of which the carrier could not claim the limitation of damages and that since Article 3 which relates to personal injuries did not contain such a requirement that, under the doctrine of *expressio unius est exclusio alterius,* the Convention does not require the express printing of the particulars of the limitations on *passenger* tickets at all. The Solicitor General agrees with the *Lisi* and understandably so.[4] Certainly human life should be held on a par with baggage and certainly the loss of human life is equally as great and as important as the loss of baggage.

The Solicitor General further notes that:

> "Petitioner's contention that the Civil Aeronautics Board 'expressly approved the form and content' of the airline passenger ticket which it used is 'misleading'. The Board did not purport to pass on, much less decide, the size of type, type face, or other typographic

4. Compare the early view as set out in *Grey v. American Airline, supra,* on the application of this rule of construction.

details the airlines should employ in printing the required warning regarding limited liability. Rather, the Board merely approved an intercarrier agreement on the form of the ticket as not adverse to the public interest, since the agreed-upon form constituted a 'substantial improvement' over the one previously in use. Moreover, the Board has not merely criticized the inadequacy of the print size used by the airlines; it has taken affirmative steps and made mandatory that carriers give international passengers additional notice—larger type—regarding limits of liability under the Warsaw Convention. See the Board's ruling at 28 F. R. 11775-11777 (Nov. 5, 1963,) and 14 C. F. R. 221.175." (Op. p. 8, 9)."

Certainly if certiorari is denied in *Lisi* the same legal position as to this petitioner-widow, who is similarly situated but in whose case unfortunately the Court of Appeals for the 3rd Circuit took the opposite point of view as to the law in respect to precisely similar if not more obscure and less informative tickets should be taken. Should this court deny certiorari in *Lisi* it should not foreclose the consideration of this same legal question presented at the same time in this case. Equal justice must be achieved for Mrs. Berguido and her five children in this case too *since the same point of law is involved.* We respectfully submit therefore that the court should now grant certiorari in the instant case, reverse on the authority of *Lisi et al.* and direct the entry of judgment for the petitioner in the sum of $375,000 plus interest and costs especially since admittedly the carrier could not prove it did all it should have done to avoid the accident (118a). See Art. 20.

That recently some 11 years after this crash the C. A. B. has directed that the airlines issue tickets which conform to the opinion of *Lisi* and otherwise now post signs and warnings on its counters in respect to the dollar limitations ($8,300) allowed under the Warsaw Convention should not in any way have any effect in the decision of this case. If

anything, the action of the C. A. B. now serves only to confirm the validity of the *Lisi* holding and the inaccuracy and error of the *Beruguido* holding below as it underwrites what the airline should have had on its tickets in the first place. The failure of the C. A. B. to police the ticket issuance up to now does not and cannot legalize what were improper tickets *ab initio.*

This has been a long and bitter battle by this widow and her five children for fair compensation due to the loss of her husband. Petitioners have borne the back breaking burden and expense of two mistrials, two jury trials and one without a jury, two appeals to the Court of Appeals and two petitions for certiorari. Before this court today appears a record that has thoroughly explored every aspect of the case. We respectfully submit that her rights should not be ignored; that she is in pari materia with *Lisi;* that the two matters should now be heard together and disposed of at the same time and apply the same holding of laws to both.

**VI. Wilful Misconduct.**

**Assuming Pro Arguendo Only That the Court Reject Our Contentions Relative to Article 3(1), (2) of the Convention, Petitioner Contends That the Trial Judge Rendered "Clearly Erroneous" Findings of Fact, Based in Part on Erroneous Legal Rules and Found in Error That Petitioner Did Not Prove That the Carrier Was Guilty of Wilful Misconduct as Required by Article 25.**

**Facts of the Accident.**

The plaintiff's case was simple on its facts. Plaintiff proved that defendant airline's pilot in order to beat the steadily deteriorating weather into Imeson Airport in Jacksonville, Florida *intentionally* descended below the permissible weather minimums hoping that he might make visual contact with the ground at some point, but while trying to execute this dangerous maneuver, got snagged in a

fifty foot pine tree and crashed causing the death of all aboard including plaintiff's decedent. Simply stated he tried an illegal sneak-in landing and failed.

Plaintiff's case was based on a background of a plane in good operating condition with satisfactory instruments on the panel and a properly operating instrument landing system on the ground. Plaintiff overwhelmingly proved that because of poor weather conditions the crew did not and indeed could not make the required visual contact with the runway when they reached the lowest possible minimum permitted by law at that airport under conditions present at that time.

Plaintiff first proved the Civil Air Regulations and rules laid down by Eastern Air Lines' own flight manual which established the absolute prohibition against departing from a glideslope, going below the weather minimums, failing to execute a missed approach and failing to ask authority to leave the glideslope until the pilot had first established actual visual contact with the ground or runway. Intentional violation of any one of these is wilful misconduct. At this juncture we must remember that the official plate required that once a pilot leaves the slope, his weather minimum for visual contact is automatically raised to 400'.

In support of the conclusion that the pilot of this airline did *intentionally* violate these Civil Air Regulations, plaintiff produced three highly qualified aeronautical experts in different phases of aeronautical science.

*First*—plaintiff produced Major Joseph Glickstein. Major Glickstein is a graduate of the United States Air Force Pilot Training School, a graduate of the United States Air Force Jet Fighter Gunnery Court, a member of the United States Air Force Defense Command and Weather Interceptor Course and a member of the Florida Air National Guard. He has taught in the field of aviation, being an instructor pilot in France, and is currently flying jets in regular up-to-date active service in the Air Force National Guard at Jacksonville, Florida (134a, 135a, 136a),

his home field. This witness categorically expressed an opinion based upon the facts produced by the plaintiff that the pilot of this airplane did *intentionally* and wilfully violate the Civil Air Regulations (583a-598a). He asserted most positively that the pilot was at the time of the crash executing a familiar though illegal approach and landing pattern known as a "sneak-in" or "take a look" maneuver in an effort to make contact by improperly descending below the authorized weather minimums (606a-609a).

*Second*—Captain Jerry Kepner. Captain Kepner is a senior National Air Lines Pilot who is presently flying jet aircraft between Miami and New York and Los Angeles. He has had twenty-five years' flying experience and had been based at Jacksonville airport for fifteen years. He has made thousands of ILS landings, many of them at Jacksonville (657a, 658a). This capable and experienced pilot testified that in his opinion based on the hypothetical facts as given to him, the pilot of this airplane was illegally using the "sneak-in" pattern [5] and that in doing so did *intentionally* depart from the glideslope and violated the authorized minimum prescribed by the Civil Air Regulation (plaintiff's Exhibit D in the Court below) to see if he could possibly make visual contact with the ground even though he had to go below the legal minimums to do so (666a-671a).

*Third*—John Prescott Cann is presently a Flight Navigator and Certified Pilot with United Airlines and is the Chief Pilot in charge of Instrument Training for Hortman Aviation Co. He is presently a designated F. A. A. Examiner and formerly was employed by T. W. A. as a flight navigator for a period of fifteen years. He regularly has flown all over the world on recognized top level American commercial airlines (716a-719a). On the basis of the same hypothetical question, he also testified without equivocation that the pilot of this airplane *intentionally* went below the

5. This pattern, though illegal was familiar and known to Eastern Airlines (1100a).

minimums seeking visual contact with the runway (722a-727a).

Thus, the plaintiff presented a solid mass of opinion and conclusions from an experienced military pilot, a commercial pilot of vast experience and a flight navigator presently an F. A. A. Examiner, that on the stated hypothetical facts Eastern's pilot on Flight 642 did intentionally violate the Civil Air Regulations.

Before asking the hypothetical question, plaintiff proved:

1. Flight 642 Eastern Air Lines on the morning of December 21, 1955 had left Miami in perfectly good operating condition in all of its parts, including its engines and all flight navigational instruments and that it had been carefully checked in Miami and that all of its components were found to be in proper order (425a-429a, 445a-446a, 749a-754a).

2. That at no time from the time that Flight 642 left Miami until the crash occurred did the crew which was in vocal radio communication with the tower until a minute or so before the crash, send any message from the plane that would in any way indicate that the plane or any part of it, its instruments, its power plant, its radio and electronic equipment were working improperly or that they were failing to operate in a normal routine usual manner.

3. The Instrument Landing System instruments on the plane which advised the pilot with respect to the glide-slope and the localizer course to follow as well as his altimeter which tells him how high he is above the ground and all other instrumentation that serve a pilot were in good operating condition and functioning properly (366a-367a, 448a).

4. That this flight had been in regular periodic communication with both Eastern radio and the airport controllers at Jacksonville airport almost immediately up to the moment of the crash and no complaints or any observation of improper functioning of the plane or any of its

components or instruments were reported by the crew (247a-260a, 280a-295a, 771a-773a).

5. That the instrument landing system on the ground was in proper operating condition and was emitting the proper beam both insofar as the marker beacon transmitters at the outer marker and the inner marker were concerned; that the localizer course radio beam was functioning accurately; the glideslope radio beam and localizer beam had functioned properly fifteen minutes before the accident and at 6:20 A. M. when tested again after the accident (Plaintiff's Exhibits 37a through 37w at trial and deposition of Mack R. Wood, 1062a-1086a, 340a-348a, 294a, 246a, 427a, 428a) it worked properly.

6. That in the last 200 feet of the flight path the aircraft was being flown at a speed approximately 140 knots and had been descending at an angle of 2½ degrees and at a rate of descent of approximately ten feet per second (509a, 510a, 912a-918a), proving a sound plane under complete pilot control right to crash impact.

7. That as that plane approached the area immediately surrounding the airport there was heavy fog from the ground up (240a-241a, 298a, 334a, 1047a, 334a-335a).

8. That the weather was reported at the airport officially as being 300 feet indefinite, half mile visibility, 10/10ths obscuration (10/10ths means one hundred percent), and ground fog, and that the wind was north eight (368a-369a).

9. That at the impact scene the fog was reported to have covered the tops of trees 60′ high (334a-335a).

10. That just prior to impact the plane was in a slight turn to the right and banked approximately 11½ degrees (510a).

11. That the plane descended below the glideslope and struck some pine trees at a point about 3500′ before reaching the touchdown point of runway 5 and was about 260′ to the left of the localizer center line extending from

the runway and about 200′ below the glideslope, and then having struck the pine tree, proceeded several hundred feet more where it struck an oak tree approximately 50′ in height and sheared it away at about 20′ from its top, after which it then crashed to the ground. The farthest piece of wreckage was 801′ from the first tree it had hit thus establishing that the plane even through all this was still under tight control and that this crash was not that of a plane suddenly losing its power causing it to plummet nose down into the ground; that the impact area was approximately 212′ northwest of the middle marker and 3486′ from the end of runway 5 (476a, 477a, 439a, 441a).

12. That after the crash, the left landing light was found to be in a retracted position and operating normally (444a), which we show, *infra*, corroborates the dense fog present and utter lack of visual contact with the runway.

All of these facts spelled out a clear picture of what happened—the underlying scenario scheme. In sum, plaintiff by virtue of her marshalling of the factual material with respect to this case and by then submitting it to three qualified experts, produced an irrefutable case of wilful misconduct. This was a clear case, accurately, convincingly and thoroughly proven in every minute detail, particularly by physical facts which simply could not be ignored. It would be expected that Eastern with its vast reservoir of experts would call men who would contradict plaintiff's evidence and theory if there were any who would so testify. This it did not do. The inferences that flow from such silence need not here be spelled out.

Defendant erected its main defense around unidentified jets which it claimed were present near the scene of the accident. For this defense it relied upon the testimony of two housewives *who did not see jets* but claimed they heard them (Mrs. Farish and Mrs. Lubin, 940a, 943a, 956a, 961a) and one Wheeler—a relative of an Eastern Air Lines Supervisor—who claimed that he was passing through the area in a truck and claimed he saw the *silhouettes* of two jets (972a) in the dense fog. The depositions of all three

of these witnesses read into the record are a blob of vagueness, self-contradiction and seemingly deliberate misstatements.

In rebuttal to this testimony, *which was entirely by deposition,* plaintiff produced by deposition the testimony of Charles R. Young and Thaddeus Taylor who heard the plane and said it was not a jet (334a, 1049a-1050a, 1043a, 1045a). Plaintiff also produced as a live witness, Franklin Cardwell, a National Airlines Flight Engineer with twenty years professional experience, who previously had testified at the C. A. B. hearing and also unequivocally stated at this trial that he had been *affirmatively* listening and did not hear jets (744a-745a) but only the distinctive sound of a propeller driven Constellation. All lived, and were within yards of the crash when it happened.

*Most importantly, Admiral Greenslade and Major Tobin at the request of the C. A. B. checked the official records of all military installations within an area of five hundred miles of Jacksonville and found that no military jets were aloft in that area at the time* (1052a-1053a, 1059a-1061a). All jets at that time were military jets (945a).

In addition, William T. McKinney, the United States radar operator at the Jacksonville tower whose job it was to check the radar scope to watch the instrument landing approach of Flight 642 said there were no planes except Eastern Flight 642 on the scope in a ten-mile range up to an altitude of 10,000 feet (256a-257a). In addition, both he and Lawrence R. Robinson, the other F. A. A. men in the tower *affirmatively* listened and heard only one plane aloft—the Constellation (propeller plane). They insisted there was no jet over the airport (247a, 248a, 259a, 282a, 283a).

Against this background, Judge Boldt found that there was a "substantial and reasonable probability" that jets caused the accident and that therefore the defendant was not guilty of wilful misconduct. This finding was clearly erroneous requiring at least a new trial. There have now been five trials. The evidence on this point was by way

of deposition. Hence this Court has the power to make its own independent finding regarding jets. In so doing, after making its own analysis of these depositions, it has the complete power to reject the finding of jets and may conclude factually that the carrier was guilty of wilful misconduct. Indeed since the proof was by deposition petitioner does not have the burden of proving that the judge's findings are "clearly erroneous" in order to have them set aside and need only prove that her own evidence is weightier. *Surgical Supply Service Inc. v. Adler,* 321 F. 2d 536, 539 (C. A. 3, 1963). Actually the finding of jets is simply and plainly "clearly erroneous".

The trial judge (Boldt, J.) who heard the facts without a jury predicated his conclusions of no negligence or wilful misconduct solely and exclusively upon a fact finding that there were military jets which cut across the path of the Constellation in which the plaintiff's decedent was a passenger, causing it to crash. Thus at the end of the trial he rendered an oral opinion (1255a) in which he said:

> "2. It is my opinion, and I now so find, there is not a preponderance of credible evidence showing a substantial or reasonable probability that the Flight 642 crew, or any of them, *under other than emergency conditions* knowingly and intentionally brought the plane to a position below the minimums prescribed for an ILS approach, or knowingly and intentionally violated any other regulation for or requirement of a proper ILS approach. (Emphasis supplied.)
>
> 3. *In my opinion there is substantial and reasonable probability shown by a preponderance of the evidence that the presence of jet aircraft in or near the ILS glide slope for Runway 5 and in or near the immediate pathway of the landing approach of Flight 642 threatened or interfered with the approach of Flight 642, bringing about emergency conditions and accident resulting in the crash without wilful misconduct, negligence or fault*

*on the part of defendant or any member of the crew of Flight 642.* (Emphasis supplied.)

4. The actual cause of the crash of Flight 642 cannot be determined on the record before me, and I find wilful misconduct as a cause of the accident to be no more than one possibility, among others.

*In any event, wilful misconduct, in my judgment, is far less probable as a cause of the crash than the highly probable presence and actions of jet aircraft in or near the ILS approach path of Flight 642.*

*As just stated, I believe there is substantial probability that one or more jet aircraft were in or near the immediate vicinity of the ILS glide slope leading to Runway 5 during the landing approach of Flight 642 within a very short period of time prior to the plane crash.''* (Emphasis supplied.)

Defendant's brief below sought to avoid the tenuous jet finding issue and rely upon other findings by the trial judge. It stated "His [Judge Boldt's] evaluation of the testimony concerning jets (Fn.) was necessarily affected by his judgment concerning the credibility of plaintiff's expert witnesses" (p. 19). But the opinion of the court shows that the converse is true: the finding of the presence of jets compelled him to disbelieve the plaintiff's experts. At 1253a the trial judge quoted from the case of *Smith v. Bell Telephone Company,* 397 Pa. 134, and he stated that the burden on the plaintiff was to produce evidence to prove the conclusion sought so . . . "as to outweigh in the mind of the fact-finder any other evidence and reasonable inferences therefrom which are inconsistent therewith".

After stating this law the judge then made the following finding (1255a):

"2. It is my opinion, and I now so find, there is not a preponderance of credible evidence showing a substantial or reasonable probability that the Flight

642 crew, or any of them under *other than emergency conditions* knowingly and intentionally brought the plane to a position below the minimums prescribed for an ILS approach, or knowingly and intentionally violated any other regulation for or requirement of a proper ILS approach." (Emphasis supplied.)

He then described what those emergency conditions were, viz: *the presence of jets* (Finding #3) (1255a), and then concludes (1255a):

> "In the event, wilful misconduct, in my judgment, is far less probable as a cause of the crash than the *highly probable presence and actions of jet aircraft* in or near the ILS approach path of Flight 642." (Emphasis supplied.)

Thus, contrary to the base upon which defendant builds its argument, it is clear that Judge Boldt's rejection of the testimony of plaintiff's experts was a result of his finding of jets. We submit that no one can read the opinion of the court below without agreeing that the finding of jets is its pivotal point.

The defendant tried to make light of the jet issue and discussed it only in a footnote (p. 19, footnote 13) in its brief below. Plaintiff reviewed the testimony in detail there and now here. The reason for carrier's avoidance of the jet issue is obvious. It has never been able to combat plaintiff's overwhelming proof that there were no jets present. It is most significant that carrier did not even mention in its footnote treatment in its brief below the most compelling testimony in the record, i.e., that of Admiral Greenslade and Major Tobin that they had no record of any jets in the area at the time, and the only jets in existence were military jets. In simple fairness how could such testimony be ignored? The thrust of all the official proof was irresistible: There were no jets.

In explanation of how he reached this conclusion that jets were present which affected the descent of Flight #642 Judge Boldt applied the rule of positive v. negative testimony. He misunderstood the rule and applied it incorrectly. Thus he said (p. 1256a):

> "To me, *affirmative* testimony as to seeing objects and hearing sounds, when unequivocal, reasonable and ringing true to the trier of fact is far more persuasive and convincing than testimony that said sights or sounds were not seen or heard by other witnesses having opportunity and occasion to see and hear. On this subject, the *negative* testimony in this case whether taken singly or as a whole, in my mind does not balance or outweigh the affirmative testimony. The testimony of Greenslade and others to the effect that no military jets were reported or recorded as operating in the Jacksonville area at the time, while given full consideration, does not convince me that jet aircraft were not or could not have seen and heard at the time and place indicated in the testimony of Wheeler, Lubin and Farrish." (Emphasis supplied.)

The Judge obviously labelled all the petitioner's evidence on jets as negative proof. Apparently to the judge's mind if one paying attention by looking or listening for a sight or sound says that despite such attention, he neither saw nor heard such occurrence, such testimony is negative and *must* be disregarded in the face of oral testimony in which another says he saw or heard the occurrence. This is not the law. Such denial of an occurrence or sight is just as much *positive* proof as testimony by another that he saw or heard it. But misconception of the law compelled his finding of jets. At least it is the only respectable explanation for so gross a misconclusion. One does not have to say "yes" to make his testimony positive. A "no"

may under proper factual circumstances be positive proof as well.

**Summary of Wilful Misconduct Argument.**

This accident occurred in the middle of the night at approximately 3:45 A. M. Two employees of the United States worked as air traffic controllers at the federal air control center at the tower at Jacksonville that night. They were totally experienced in aircraft, their sounds, movement and action. They testified without hesitancy or doubt that they were listening and heard only one plane overhead the airport and that that plane was a propeller driven Constellation which travelled the natural flight path that the fatal flight of #642 (a Constellation) would normally follow as it circled the airport prior to making its approach to runway 5. Moreover these men had the benefit of scanning the radar scope which would reveal all planes within a range of ten miles in all directions of the airport. They insisted that they saw only one plane on the scope and that that plane flew right on line with the path that the fatal Constellation would be flying in making an approach to runway 5. Superimposed on all of this testimony was official documentary evidence given by each and every branch of the military service which alone flew jets in that area. There were a number of others called by petitioner, both trained in aviation work and laymen who lived for many years in the vicinity who positively stated there was only one plane in the area and that that plane was a propeller driven vehicle. This array of proof completely and totally proved that there were no jets aloft at that time within a distance of 500 miles in all directions of the airport.

In the face of such compelling evidence, the trial judge nonetheless stated that he believed three witnesses called

by defendant who gave testimony about jets which admittedly they did not see, which was so self-contradictory and so palpably untrue as to lead even the majority to say that "the evidence supporting it (jets) is exceedingly thin."

In the light of this admission, common justice requires that this Court overrule the trial judge's finding in this respect as so vigorously urged by the minority below since it falls completely within the rule of *Surgical Supply Co. v. Adler,* 321 F. 2d 536, 539 (C. A. 3, 1963); *Mobile Tankers Co. S. A. & Sacony Oil Co., Inc. v. Mene Grande Oil Co.,* 363 F. 2d 611 (C. A. 3, 1966) and is not covered by the "clearly erroneous" rule. Under this rule this court is completely free to make its own findings of fact because the testimony was given by *deposition* and therefore it may reject the trial judge's findings when it finds other conclusions more logical and credible. Even were this Court to apply the "clearly erroneous" rule, it would be compelled in simple justice to hold that that finding of jets was "clearly erroneous" because anyone reviewing the "entire testimony must be left with a definite and firm conviction that a mistake has been committed". *United States v. U. S. Gypsum Co.,* 333 U. S. 364.

The trial judge made a hodge-podge of inconsistent fact findings on the score of the defendant's negligence. Having found that the defendant was free of all fault he still strangely awarded $8,300 in damages to the plaintiff, *which under Art. 20 he had no power to do if the defendant was totally free of fault.* His finding that there were jets was clearly speculative and mere speculation cannot be allowed to do duty for probative facts. *Galloway v. United States,* 319 U. S. 372, 395 (1943); *Noel v. United Aircraft Corp.,* 342 F. 2d 232, 239 (3rd Cir. 1964). He confused the rule relative to *affirmative* testimony and held that though a number of witnesses had positively stated that there were no jets in the air, that that testimony amounted to *negative* testimony and applied the rule that negative proof has no probative value even though they had affirmatively stated that there

were not jets present, and even though those witnesses were actively looking and listening for aircraft movement. This was in complete disagreement with the law of the Third Circuit stated by our own Judge Biggs in *Eiseman v. P. R. R.*, 151 F. 2d 222 (3rd Cir. 1945), and the Supreme Court of Pennsylvania in *Enfield v. Stout*, 400 Pa. 6 (1960) and this misconception of the positive v. negative rule led him via legal error into gross mistake in his finding of jets.

The trial judge found that "the actual cause of the crash of Flight #642 cannot be determined on the record before me "but then ignored the fact that where a crash of this kind occurs and a plane falls short of the runway while on the direct path to the runway, it creates a clear *res ipsa loquitour* situation which requires submission of the case to the jury and that on failure of the carrier to offer proof to the contrary, a verdict for the plaintiff should have been rendered. And this is especially true when the carrier admits that it had no exculpatory evidence to offer for itself (118, 119[a]). Thus in *Citrolla v. Eastern Airlines, Inc.*, 264 F. 2d 815 (C. A. 3, 1959), *a case arising out of this very same crash*, that plaintiff prevailed on simple negligence predicated on *res ipsa loquitur*, under these precise facts since her passenger was not engaged in an international flight. Moreover since admittedly #642 violated the Civil Air Regulations by going below the minimum permissible in that weather, the carrier was guilty of wilful misconduct. *Tuller v. K. L. M. Royal Dutch Lines*, 292 F. 2d 775 (C. A. D. C. 1961).

The attempt by the trial judge to stifle the appellate courts in their review of his exceptional actions and rulings, by stating that he did not consider any evidence to which the plaintiff objected and accepted all the evidence which the plaintiff offered, although objected to by the defendant is an old and weary ploy to prevent a reversal by the appellate courts on rulings on evidence and is part and parcel of the trial judge's conduct in this case to which all fair men must react with a fierce sense of justice gone awry. If ever

a plaintiff proved a case of wilful misconduct it was here. The plaintiff called as experts an extraordinary array of expert aviation talent including a 20-year man in piloting National Airlines planes of all descriptions including the latest jets—a Navy pilot of 15 years experience, a TWA Navigator and flight engineer and pilot of many years experience, a world famous heart specialist and Professor Emeritus at the University of Pennsylvania Medical School [6] and a leading meteorologist, Dr. Francis Davis of Philadelphia weather fame, all of whom the judge blasted—utterly without basis as untrustworthy of belief. Instead he accepted the testimony of a truck driver related to an Eastern Airlines employee. Even after this witness's testimony had been doctored by an Eastern Claims Agent to get him into the crash area on time so as to be able to have seen or heard anything which was impossible under his first story, at best he still only claimed to have allegedly seen (but not heard) the silhouettes of jets in the pea soup clouded sky. The judge also relied on a confused housewife who, awakened from her sleep by the noise of the crash, said contradictory things about what she heard but did not see, and another lady who had at the C. A. B. hearing very insistently said she heard only one (1) plane but changed her testimony at the trial to meet the carrier's story of two (2) planes on the scene. In checking the trial record of the first trial though the carrier already had the depositions of these two ladies, it evidently considered them of such low probative value that it did not offer those selfsame depositions in evidence at that trial.

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6. Petitioner proved from respondent's own records that one of its pilots on this plane had forged his medical certification required by the C. A. B. and that both pilots had high blood pressure and heart conditions of which they were each aware. If petitioner's proof of attempted sneak-in be rejected, at least the judge should have found that the accident was caused by heart failure or stroke of the pilot who in clear wilful misconduct had knowingly been permitted to fly a commercial passenger plane despite his serious heart and blood pressure ailments of which the airline was *aware* rather than accept the dubious defense of jets which even the majority characterized as "exceedingly thin".

This resumé must shock all who read this record and render them compelled vigorously to attack these findings as they represent a manifest miscarriage of justice. The pages of this record blare out in unison one of the most shocking pages of wanton misconduct and gross negligence in the history of American aviation. The findings of no wilful misconduct is simply a stubborn, confused and unsupportable piece of judicial mockery.

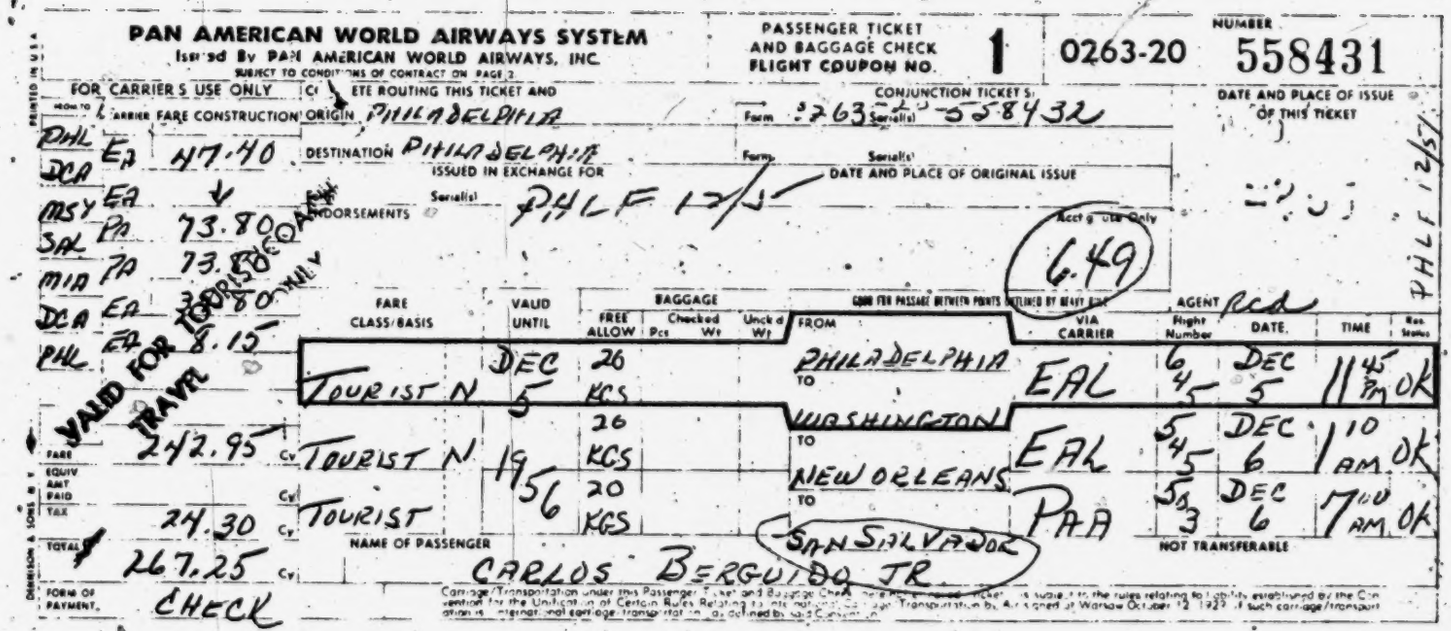
Respectfully submitted,

B. NATHANIEL RICHTER,
SEYMOUR I. TOLL,
*Counsel for Petitioners.*

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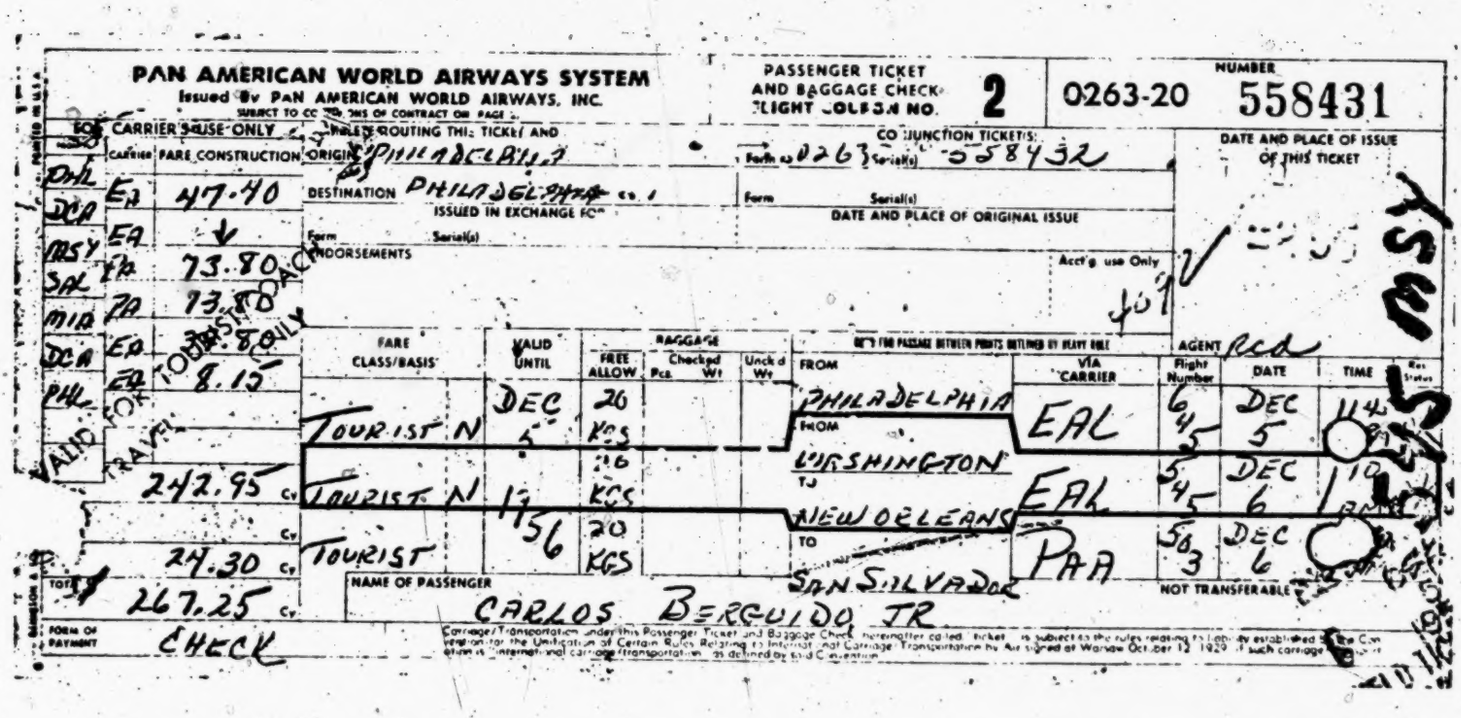
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NOT TRANSFERABLE

NAME OF PASSENGER: CARLOS BERGUIDO JR

Carriage/Transportation under this Passenger Ticket and Baggage Check hereinafter called "ticket" is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules Relating to International Carriage Transportation by Air signed at Warsaw October 12 1929 if such carriage is "international carriage" as defined by said Convention

**PAN AMERICAN WORLD AIRWAYS SYSTEM**
Issued By PAN AMERICAN WORLD AIRWAYS, INC.
SUBJECT TO CONDITIONS OF CONTRACT ON PAGE 2

PASSENGER TICKET AND BAGGAGE CHECK FLIGHT COUPON NO. **3**

NUMBER **0263-20 558431**

FOR CARRIER'S USE ONLY

COMPLETE ROUTING THIS TICKET AND ENDORSEMENTS

ORIGIN PHILADELPHIA

DESTINATION PHILADELPHIA

CONJUNCTION TICKET(S) Form 0263 Serial(s) 558432

ISSUED IN EXCHANGE FOR Form Serial(s)

DATE AND PLACE OF ORIGINAL ISSUE

DATE AND PLACE OF ISSUE OF THIS TICKET (85)

Agent's use Only

HONORED

AGENT

| CARRIER | FARE CONSTRUCTION |
|---|---|
| DHL | |
| DCA | EA 47.40 |
| MSY | EA ↓ |
| SAL | PA 73.80 |
| MIA | PA 73.80 |
| DCA | EA 38.75 ONLY |
| PHL | EA 08.15 |
| | |
| | |

| | |
|---|---|
| FARE | 247.95 Cr |
| EQUIV. AMT PAID | Cr |
| TAX | 24.30 Cr |
| TOTAL | 267.25 Cr |
| FORM OF PAYMENT | ** CHECK |

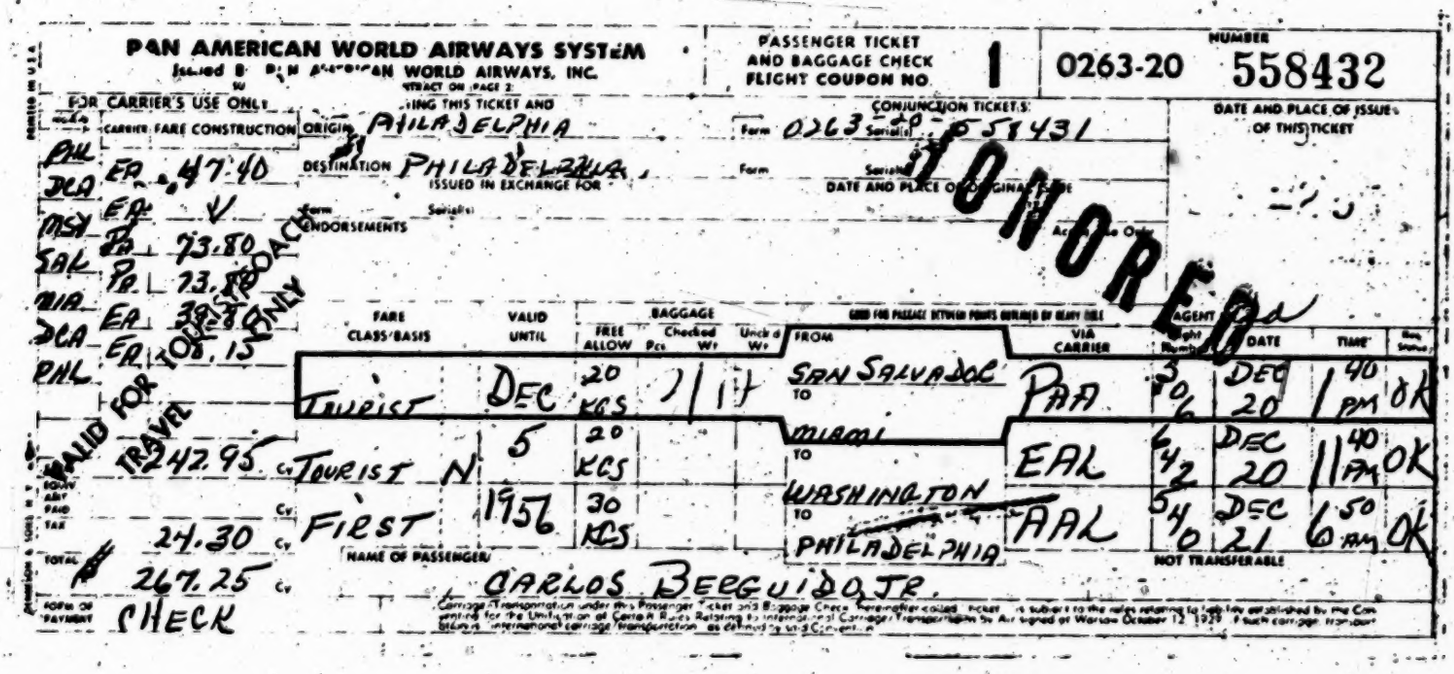
| CLASS/BASIS | | VALID UNTIL | BAGGAGE FREE ALLOW | Checked Pcs. Wt | Unch'd Wt |
|---|---|---|---|---|---|
| TOURIST | N | DEC 5 | 20 KGS | | |
| TOURIST | N | 14 56 | 20 KGS | | |
| TOURIST | | | 20 KGS | 2 | 18 |

| FROM | TO | VIA CARRIER | Flight Number | DATE | TIME | Status |
|---|---|---|---|---|---|---|
| PHILADELPHIA | WASHINGTON | EAL | 615 | DEC 5 | 11:45 AM | OK |
| WASHINGTON | NEW ORLEANS | EAL | 543 | DEC 6 | 10 AM | OK |
| NEW ORLEANS | SAN JUAN | PAA | 263 | DEC 6 | 7 PM | OK |

NAME OF PASSENGER CARLOS BENCUIDO JR. MR

NOT TRANSFERABLE

Carriage/Transportation under this Passenger Ticket and Baggage Check hereinafter called "ticket" is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules Relating to International Carriage/Transportation by Air signed at Warsaw October 12, 1929, if such carriage/transportation is "international carriage/transportation" as defined by said Convention



PAN AMERICAN WORLD AIRWAYS SYSTEM
Issued by PAN AMERICAN WORLD AIRWAYS, INC.
SUBJECT TO CONDITIONS OF CONTRACT ON PAGE 2

PASSENGER TICKET AND BAGGAGE CHECK
FLIGHT COUPON NO. 1

NUMBER 0263-20 558432

FOR CARRIER'S USE ONLY

ISSUING THIS TICKET AND CONJUNCTION TICKETS:
Form 0263 Serial 558431

DATE AND PLACE OF ISSUE OF THIS TICKET

ORIGIN PHILADELPHIA
DESTINATION PHILADELPHIA
ISSUED IN EXCHANGE FOR
DATE AND PLACE OF ORIGINAL ISSUE
ENDORSEMENTS

DISHONORED

| CARRIER | FARE CONSTRUCTION |
|---|---|
| PAA | |
| DCA | EA 47.40 |
| MSY | EA V |
| SAL | PA 73.80 |
| MIA | PA 73.80 |
| DCA | EA 38.80 |
| PHL | EA 108.15 |

VALID FOR TRAVEL ON JET COACH TOURIST ONLY

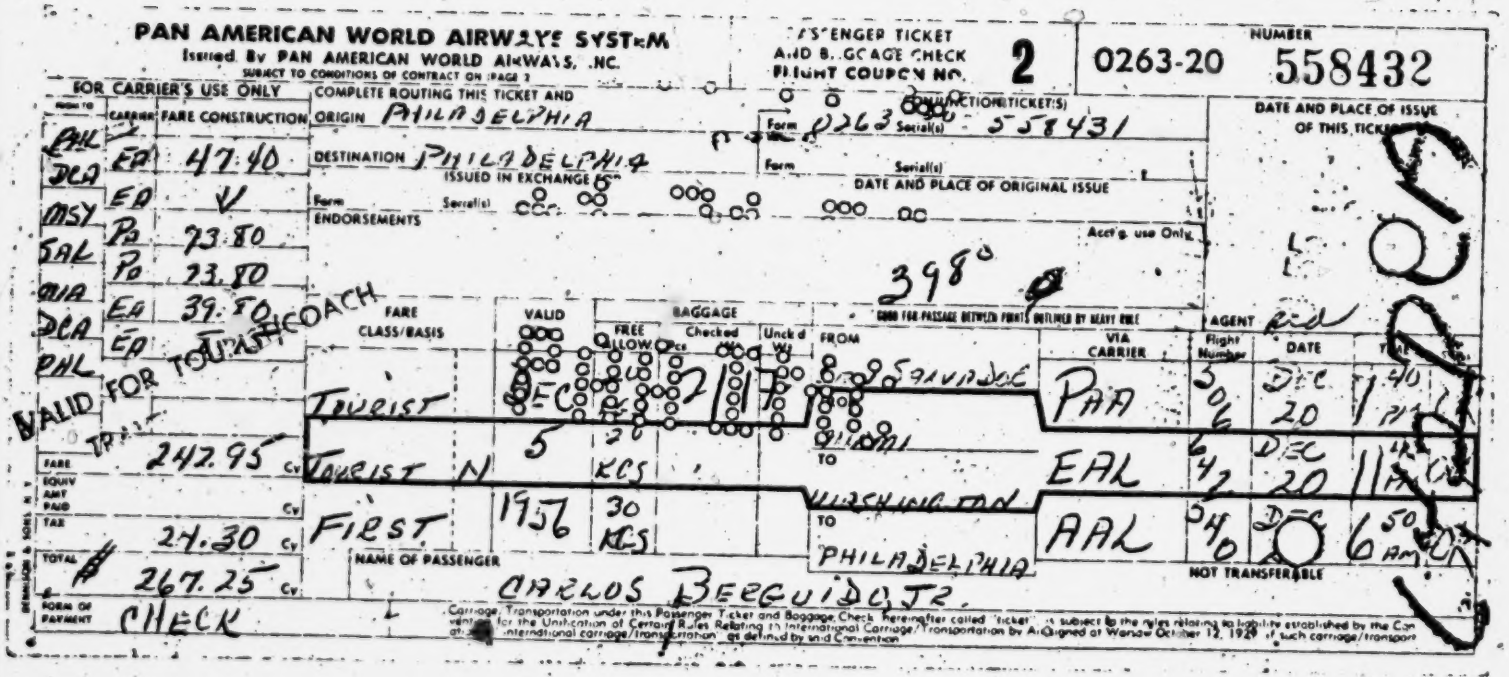
| | FARE CLASS/BASIS | VALID UNTIL | BAGGAGE FREE ALLOW | Checked Pcs | Checked Wt | Unch'd Wt | FROM / TO | VIA CARRIER | Flight Number | DATE | TIME | Non Smoking |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | TOURIST | DEC | 20 KGS | 1 | 1 | | SAN SALVADOR / MIAMI | PAA | 906 | DEC 20 | 1 40 PM | OK |
| 242.95 Cr | TOURIST N | 5 | 20 KGS | | | | MIAMI / WASHINGTON | EAL | 642 | DEC 20 | 11 40 AM | OK |
| 24.30 Cr | FIRST | 1956 | 30 KGS | | | | WASHINGTON / PHILADELPHIA | AAL | 540 | DEC 21 | 6 50 AM | OK |
| TOTAL 267.25 Cr | | | | | | | | | | | | |

NOT TRANSFERABLE

NAME OF PASSENGER CARLOS BEEGUIDO JR.

FORM OF PAYMENT CHECK

Carriage / Transportation under this Passenger Ticket and Baggage Check hereinafter called "ticket" is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules Relating to International Carriage / Transportation by Air signed at Warsaw October 12 1929 unless such carriage / transportation is not "international carriage / transportation" as defined by said Convention.



PAN AMERICAN WORLD AIRWAYS SYSTEM
Issued By PAN AMERICAN WORLD AIRWAYS, INC.
SUBJECT TO CONDITIONS OF CONTRACT ON PAGE 2

PASSENGER TICKET AND BAGGAGE CHECK
FLIGHT COUPON NO. 2

0263-20 NUMBER 558432

FOR CARRIER'S USE ONLY

| FROM/TO | CARRIER | FARE CONSTRUCTION |
|---|---|---|
| PHL | | |
| DCA | EA | 47.40 |
| MSY | EA | V |
| SAL | PA | 73.80 |
| MIA | PA | 73.80 |
| DCA | EA | 39.50 |
| PHL | EA | TOURIST COACH |

VALID FOR TOURIST

TP 242.95 Cv

FARE 242.95 Cv
EQUIV AMT PAID
TAX 24.30 Cv
TOTAL $ 267.25 Cv
FORM OF PAYMENT CHECK

COMPLETE ROUTING THIS TICKET AND
ORIGIN PHILADELPHIA
DESTINATION PHILADELPHIA
ISSUED IN EXCHANGE
Form Serial(s)
ENDORSEMENTS

CONJUNCTION TICKET(S)
Form 0263 Serial(s) 558431
Form Serial(s)
DATE AND PLACE OF ORIGINAL ISSUE

Acct's use Only
398

GOOD FOR PASSAGE BETWEEN POINTS OUTLINED BY HEAVY RULE

AGENT

| FARE CLASS/BASIS | VALID | BAGGAGE FREE ALLOW. | Checked | Unck'd | FROM | VIA CARRIER | Flight Number | DATE | TIME |
|---|---|---|---|---|---|---|---|---|---|
| TOURIST | DEC | 2 | 11 | | PHILADELPHIA | PAA | 306 | DEC 20 | 1 40 PM |
| TOURIST N | 5 | 20 | KGS | | WILMINGTON TO | EAL | 42 | DEC 20 | 11 45 AM |
| FIRST | 1956 | 30 | KGS | | WASHINGTON TO PHILADELPHIA | AAL | 540 | DEC 20 | 6 50 AM |

NOT TRANSFERABLE

NAME OF PASSENGER CARLOS BEEGUIDOJR.

Carriage/Transportation under this Passenger Ticket and Baggage Check hereinafter called "ticket" is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules Relating to International Carriage/Transportation by Air signed at Warsaw October 12, 1929 if such carriage/transportation is "international carriage/transportation" as defined by said Convention

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 15156

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MARION J. BERGUIDO, INDIVIDUALLY; MARION J. BERGUIDO, ROBERT G. ROWE AND WARREN H. WOODRING, EXECUTORS OF THE ESTATE OF CARLOS BERGUIDO, JR.; AND JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO AND CARLOS BERGUIDO, 3D, BY THEIR GUARDIAN MARION J. BERGUIDO,

*Appellants*

*v.*

EASTERN AIR LINES, INCORPORATED

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ON PETITION FOR REHEARING BY MARION J. BERGUIDO, ET ALS.

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Before: STALEY, *Chief Judge*, BIGGS, MCLAUGHLIN, KALODNER, HASTIE, FORMAN, SMITH, FREEDMAN and SEITZ, *Circuit Judges*

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**OPINION OF THE COURT**

(Filed June 9, 1967)

PER CURIAM:

The petition for rehearing is denied.

KALODNER, *Circuit Judge*, dissenting

I would grant the petition for rehearing for these reasons:

(1) The trial court's $8300 award to the plaintiffs after it had found that they had suffered damages of $375,000 was based on fact-findings which were "clearly erroneous" and, against the overwhelming weight of the evidence; the trial court applied erroneous legal standards in its categorization of evidence as "negative" and rejected it for that reason; the fact-findings were based on rank speculation as evidenced by the trial court's statement that "*the actual cause of the crash of Flight 642 cannot be determined on the record before me. . .*"; (emphasis supplied) and the trial court's fact-findings were inconsistent, and its judgment was inconsistent with its fact-findings;

(2) the trial court and this Court have failed to give effect to dispositive provisions of the Warsaw Convention which (a) accord the presumption of negligence on the part of a carrier where one is killed or injured aboard a plane and (b) make unavailable to the carrier the liability limitations of the Convention where there has been a failure to deliver a passenger ticket which advises the passenger of such limitations.

In my dissent reported at 369 F.2d 874, 880-886 (3 Cir. 1966), I spelled out in detail the respects in which the trial court and this Court failed to give effect to the provisions of the Warsaw Convention.

It would serve no useful purpose to here restate what I said in my dissent on the score stated.

Attention, however, must be called to the fact that the United States Court of Appeals for the Second Circuit, subsequent to the filing of my dissent, has, at 370 F.2d 508 (1966), affirmed Lisi v. Alitalia-Linee Aeree Italiane, 253 F. Supp. 237 (S.D.N.Y. 1966), where it was held that a

passenger ticket similar to that here involved failed to comply with the requirement of the notice provisions of Article 3(1)(e) of the Warsaw Convention and that the liability limitations of the Convention were for that reason not available to the carrier.

In affirming, the Second Circuit, after quoting the relevant liability-limiting Articles of the Convention, said at 370 F.2d 511-514:

> "These Articles, moreover, provide that the ticket and check shall contain certain specified information, including 'a statement that the transportation is subject to the rules relating to liability established by this convention.' Thus, it would appear, that unless the carrier furnishes to the passenger a ticket or baggage check containing the appropriate statement, it may not restrict its liability as circumscribed by the Convention Articles.
>
> * * *
>
> "The Convention's arbitrary limitations on liability which have been severely and repeatedly criticized—are advantageous to the carrier. But the *quid pro quo* for this one-sided advantage is delivery to the passenger of a ticket and baggage check which give him notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially. Thus the passenger is given the opportunity to purchase additional flight insurance or to take such other steps for his self-protection as he sees fit.
>
> "This notice to passengers is especially important in this country where the overwhelming number of people who travel by air do so on domestic flights, for which the Convention's restrictions on liability are inapplicable. It is too much to expect these passengers to be sufficiently sophisticated to realize that although they are traveling the same number of miles on an international flight that they have frequently traveled

domestically, the amount they may recover in the event of an accident is drastically reduced. . . .

"We proceed to determine, therefore, whether the particular tickets and baggage checks involved in the present case gave the appellees adequate notice. On the front of the ticket and baggage check, in exceedingly small print, was the following message: 'Each passenger should carefully examine this ticket, particularly the Conditions on page 4' . . . .

"Judge MacMahon appropriately characterized the 'notice' to the passengers in his pithy conclusion as 'camouflaged in Lilliputian print in a thicket of "Conditions of Contract". * * * Indeed the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that they are so artfully camouflaged that their presence is concealed.' 253 F. Supp. at 243. Accord, Warren v. Flying Tiger Line, Inc., supra, 352 F.2d at 497. But see Seth v. British Overseas Airways Corp., 320 F.2d 302 (1st Cir.), cert. denied, 379 U.S. 858, 85 S.Ct. 114, 13 L.Ed.2d 61 (1964).

"We agree that a jury could not reasonably have found that the tickets and baggage checks gave the passengers the required notice. The District Court properly granted partial summary judgment striking out these affirmative defenses of appellant."

The disposition made by this Court at 369 F.2d 874 in the instant case is in conflict with that made by the Second Circuit and for that reason alone requires the granting of the petition for rehearing.

Chief Judge Staley joins in this dissent.

**A True Copy:**

**Teste:**

*Clerk of the United States Court of Appeals for the Third Circuit.*

# APPENDIX D

## JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Present: BIGGS, KALODNER and FORMAN, *Circuit Judges.*

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed September 30, 1964, be, and the same is hereby affirmed, with costs.

ATTEST:

IDA O. CRESKOFF,
*Clerk.*

November 23, 1966.

## APPENDIX E

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### ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT. SUR PETITION FOR REHEARING.

Present: STALEY, *Chief Judge*, BIGGS, MCLAUGHLIN, HASTIE, FORMAN, SMITH, FREEDMAN and SEITZ, *Circuit Judges*.

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

ATTEST:

THOMAS F. QUINN,
*Clerk*.

Dated: June 9, 1967.

STALEY, *Chief Judge*, and KALODNER, *Circuit Judge*, dissent from the denial of the petition for rehearing.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15156

MARION J. BERGUIDO, INDIVIDUALLY, MARION J. BERGUIDO, ROBERT G. ROWE AND WARREN H. WOODRING, EXECUTORS OF THE ESTATE OF CARLOS BERGUIDO, JR., AND JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO AND CARLOS BERGUIDO, 3D, BY THEIR GUARDIAN MARION J. BERGUIDO,

*Appellants*

*v.*

EASTERN AIR LINES, INCORPORATED

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued September 16, 1965

Before BIGGS, *Chief Judge,* and KALODNER and FORMAN, *Circuit Judges.*

## OPINION OF THE COURT

(Filed November 23, 1966)

By FORMAN, *Circuit Judge.*

This is the second appeal to reach us in the wrongful death action brought in the United States District Court for the Eastern District of Pennsylvania, individually, as guardian and as executors of the estate of the deceased,

Carlos Berguido, Jr. [hereinafter referred to as plaintiff, plaintiff-appellant, and appellant], against Eastern Air Lines [hereinafter referred to as defendant, defendant-appellee, and appellee]. Decedent was a passenger for hire on a constellation that crashed near Imeson Airport, Jacksonville, Florida in the early morning of December 21, 1955.

Following two mistrials, a third trial, before a jury, resulted in a verdict for plaintiff. The jury found that the crash was the result of one or more acts of wilful misconduct on the part of the defendant. Defendant's attempt to limit its liability to $8300 under the Warsaw Convention [1] governing international airplane flights was thus defeated.[2] We reversed on evidentiary grounds.[3]

A fourth trial, before a jury, produced a verdict for plaintiff, but only for the limited Warsaw Convention liability of $8300, this jury resolving the issue of wilful misconduct adversely to the plaintiff. However, upon plaintiff's motion, the District Court vacated its judgment and granted a new trial.[4] Defendant applied to this court for a writ of mandamus and prohibition, arguing that the District Court had exceeded its power in granting the new trial. We denied the writ [5] as well as a petition for reargument.[6]

---

1 Article 22(1) of the Convention for the Unification of Certain Rules Relating to International Tranportation by Air (Warsaw Convention), 49 Stat. 3014, 3019 (1936) states:

"In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. . . ."

2 Article 25(1) of the Warsaw Convention, 49 Stat. 3014, 3020 (1936) provides:

"The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct."

3 Berguido v. Eastern Air Lines, 317 F.2d 628, *rehearing denied*, 317 F.2d 633 (3 Cir.), *cert. denied*, 375 U.S. 895 (1963).

4 Berguido v. Eastern Air Lines, Inc., 35 F.R.D. 200 (E.D. Pa. 1964).

5 Eastern Air Lines Inc. v. Clary, No. 14940, 3 Cir., June 18, 1964.

6 Eastern Air Lines, Inc. v. Clary, No. 14940, 3 Cir., July 10, 1964.

The case was then scheduled for its fifth trial. The posture of the case was as it was at the previous trials. Defendant, having pleaded the Warsaw Convention, was attempting to limit its liability to $8300,[7] while plaintiff's main efforts were directed at proving either that the decedent's flight was not international, or that defendant was guilty of wilful misconduct so as to otherwise eliminate the Warsaw Convention defense. The plaintiff had presented alternate theories of defendant's wilful misconduct. It was urged by plaintiff that the pilot of the Eastern constellation had attempted a "sneak-in" landing—dropping down through a low cloud ceiling into a position below the authorized Instrument Landing System (ILS) approach minimum elevation. This theory was developed by plaintiff through the presentation of hypothetical questions to experts, Glickstein, Kepner and Cann. Plaintiff's alternative theory was that both the pilot and the co-pilot operating the aircraft had submarginal heart conditions. Medical records were introduced in support of this theory.

Plaintiff alleges that it also urged that defendant had not met its obligations under Article 3(1) of the convention [8] and, thus, the Convention did not apply. Plaintiff

7 Defendant conceded that it could not sustain its burden of proof under Article 20(1) of the Warsaw Convention which states:

"The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." 49 Stat. 3014, 3019 (1936).

8 Plaintiff contends that Article 3(1) of the Convention, 49 Stat. 3014, 3015 (1936) enumerates the conditions precedent to the applicability of the Convention and that the failure of the defendant carrier to so comply both removes the Convention as a defense and places the burden on plaintiff merely of proving negligence. Article 3(1) provides:

"(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

"(a) The place and date of issue;

"(b) The place of departure and of destination;

"(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

"(d) The name and address of the carrier or carriers;

"(e) A statement that the transportation is subject to the rules relating to liability established by this convention."

appears to indicate that the District Court was thus urged in the alternative to try the case on the theory of simple negligence.

The parties waived trial by jury. They also agreed that the District Court need not enter findings of fact and conclusions of law, which are *required* by Federal Rule of Civil Procedure 52(1) in non-jury cases. The parties further specified that the District Court might limit its decision to a general finding either for or against liability and in a single total sum fixing damages, just as a jury would do. Despite the acquiescence by the parties to a short form of disposition, not authorized by the Federal Rules, the District Court did file an opinion[9] in which it set forth findings of fact on certain aspects of its ruling.

Summarily determining the international nature of the flight, a finding which the plaintiff does not now contest, the bulk of the District Court's opinion is devoted to a discussion of whether the defendant was guilty of wilful misconduct. A discussion of whether defendant complied with Article 3(1) of the Warsaw Convention is absent, although the Convention was determined to be applicable. The District Court observed that this was a case where the evidence of wilful misconduct was meager and incomplete, making the search for truth a most difficult task. It stated that a considerable number and variety of causes of the accident were within the realm of possibility. The District Court observed further that in a case such as this, where the search is for the cause of the accident, the judgment of a court must be determined upon the probabilities insofar as they can be determined from the evidence, and not on a

8 (continued)
Article 3(2) provides further, however, that:

"The absence, irregularity, or loss of the passenger ticket shall not affect the existence of the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability."

9 Berguido v. Eastern Air Lines, Inc., Civil No. 21836, E.D. Pa., Sept. 30, 1964.

mere possibility, even if such possibility be disclosed by the evidence.

The above preliminary observations were followed by a statement of "firm findings" which the District Court apparently considered facts found "specially" conforming to the requirement of Federal Rule of Civil Procedure 52(1). The District Court found that there was not a preponderance of credible evidence that a health condition constituted wilful misconduct *causing or contributing to* the the crash of the constellation. As to the "sneak-in" theory, the District Court stated that it could not find as proven by the preponderance of the evidence all of the assumed facts stated in the hypothetical questions put to plaintiff's experts. But, even if all the assumed facts were taken to be proven, said the District Court, the conclusions reached by plaintiff's experts were not believable. Rather, the District Court chose to find that there was a substantial and reasonable probability that the presence of jet aircraft in or near the ILS glide slope for the Eastern constellation interfered with the aircraft, bringing about emergency conditions resulting in the accident, the theory of the defendant. The Court then concluded that defendant was guilty neither of wilful misconduct nor of negligence. Having previously found the Warsaw Convention applicable, judgment was entered against the defendant for $8300. Though finding against defendant's liability above $8300, the District Court indicated, albeit quite unnecessarily, that plaintiff had suffered $375,000 in damages.

—I—

Prior to examining plaintiff-appellant's position on this appeal, a question of some moment is whether the District Court complied with Federal Rule of Civil Procedure 52(1). The agreement between the parties, that the District Court need not enter findings of fact, is not effective. The requirement of Rule 52(1) is mandatory, the findings in

part serving as a necessary aid to the appellate courts.[10] If a full understanding of the factual issues cannot be gleaned from the District Court's opinion, we would be obliged to remand for compliance with Rule 52(1).

Were the findings, as prepared, sufficient compliance with Rule 52(1)? Concerning plaintiff's theory of the submarginal heart conditions of the pilot and co-pilot, the single finding that there was no probable causal relationship shown between their heart conditions and the accident is ample to meet the requirement of Rule 52(1). The basis of the Court's ruling is clear and an examination of the record will reveal whether there is substantial support for it.

The District Court did not, however, comply with Rule 52(1) when it found, without further elaboration, that some of the assumed facts stated in the hypotheticals were not proven. But for the Court's further assuming the validity of all the facts in the hypotheticals for purposes of testing whether the defendant, even under those circumstances, was guilty of wilful misconduct, the failure to elaborate on the inadequacy of the hypotheticals would have been a fatal defect requiring a remand. The Court did find, however, that assuming the accuracy of the facts in the hypotheticals, plaintiff's expert witnesses, Glickstein, Kepner and Cann, drew a conclusion therefrom as to the probable cause of the accident that was not believable. Considerable effort was exercised by the Court in analyzing the basis for the refusal to accept their conclusion. Such elaboration qualifies the finding as sufficient under Rule 52(1), if indeed a specific finding by the trier of fact is needed when the issue is one of credibility.

As to the District Court's finding that jet aircraft in or near the ILS glide slope interfered with the Eastern constellation and, therefore, defendant was not guilty of wilful misconduct, this states a fact susceptible of examina-

10 5 Moore, Federal Practice § 52.06[1], at 2653 (2d ed. 1951).

tion by an appellate court and thus is in compliance with Rule 52(1).

As an initial matter we conclude, therefore, that the requirements of Rule 52(1) have been sufficiently met.[11] The findings of fact and conclusions of law may now be considered in the light of plaintiff-appellant's appeal contentions.

—II—

Appellant now concedes the international nature of the flight and to this extent the applicability of the Warsaw Convention. It is contended for the first time, however, that the litigants to this suit, as well as most courts which have previously dealt with the question of liability under the Warsaw Convention, have labored under a misconception concerning the scheme of the Convention. Appellant urges a theory of unlimited absolute liability in the face of the appellee's alleged failure to comply with Article 3(1) of the Convention. It is argued that Article 17 [12] provides for unlimited absolute liability unless a *carrier* proves that it has complied with Article 3(1). Appellee, urges appellant, having failed to carry its burden of proof is, as a matter of law, liable without fault for the total amount of appellant's damages, under Article 17 of the Convention. Specifically, appellant contends that appellee has failed to prove both actual delivery of the ticket to the decedent and actual delivery of an *adequate* ticket showing (1) all agreed stopping places and (2) the provisions of the Convention

11 The failure of the District Court to discuss the issue of defendant's complying with Article 3(1) of the Warsaw Convention, *supra* note 8, seems to be due to its understanding of the pre-trial limitation of the issues. This problem will be discussed and disposed of below in a different context, however, and need not further clutter the issue of the Court's compliance with Rule 52(1).

12 Article 17, 49 Stat. 3014, 3018 (1936) reads:

"The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

which limit a carrier's liability. Although appellant's contention is that the burden of proof is on the carrier, an attempt is also made by appellant to affirmatively show the inadequacy of the ticket, although not the failure to actually deliver that ticket. However, failing acceptance of this approach, appellant urges that the District Court's finding of no wilful misconduct by the appellee was clearly erroneous.

Appellee contends that the issue of compliance with Article 3(1) of the Convention was eliminated from the case at pre-trial and that, nevertheless, a plaintiff, and not a carrier-defendant, has the burden of proving non-compliance with Article 3(1). Actual non-delivery of the ticket under Article 3(2) is also urged as the only Article 3(1) conduct of a carrier which will defeat the Convention as a defense. As to the question of wilful misconduct, appellee urges that there was substantial basis for the District Court's exonerating it therefrom. Appellee furthermore cross-assigns as error the District Court's grant of the motion for a new trial subsequent to the jury verdict in its favor at the fourth trial, which resulted in the fifth trial from which this appeal has been taken.

The contentions thus having been outlined, we now turn to their disposition.

—III—

Appellant has urged that both *Grey v. American Airlines*[13] and *Westminster Bank v. Imp. Airways, Ltd.*[14] stand for the proposition that liability under Article 17 of the Warsaw Convention, as an initial matter, is absolute and unlimited. To avoid such liability a carrier must demonstrate compliance with Article 3(1) of the Convention, argues appellant. Neither case supports the proposition, for the question of whether Article 17 provides such *unlimited* absolute liability for the death of a passenger was not an issue therein. Furthermore, in the first appeal before this court, Judge McLaughlin, though not faced

13 227 F.2d 282 (2 Cir. 1955).
14 2 All E. R. 890 (K.B. 1936).

squarely with the issue as here raised, in effect disposed of it by appropriately reading Articles 17 and 22(1)[15] in pari materia. It was thus stated:

> ". . . The Warsaw Convention provides, inter alia, that the carrier is absolutely liable for all injuries where the accident causing the damage so sustained took place on board the aircraft. Article 17. In such circumstances the liability of the carrier for each passenger is limited to 125,000 francs (approximately $8300). Article 22(1) . . . ."[16]

Article 17 itself gives no indication of the extent of a carrier's liability. It must be read with Article 22(1) for the question concerning the extent of the liability to be answered, and an analysis of the question does not support absolute *unlimited* liability as the scheme of the Convention.

Having thus disposed of this contention, appellant must sustain either (1) its argument that the District Court erroneously found that the appellee was free from wilful misconduct or (2) its argument that there had not been compliance with Article 3(1) of the Convention. Success of the latter argument would have removed the Convention defense of limited liability and allowed the suit to proceed to trial, with the plaintiff's burden being merely to prove the negligence of the defendant, rather than wilful misconduct, this approach being the appropriate substitute for appellant's urged absolute and unlimited liability without fault theory.

Such contention, revolving around a construction of Article 3(1), raises the more specific issues of (a) which party has the burden of proof to show compliance or a failure thereof, (b) whether the issue as framed by appellant was eliminated at pre-trial, (c) whether the record

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15. *Supra* note 1.

16 Berguido v. Eastern Air Lines, *supra* note 3 at 629. (Emphasis added.)

before us is sufficient to allow us to dispose of the merits of the mixed questions, and (d) if the record is ample, whether appellee has complied with Article 3(1) and what are the legal ramifications if it has not done so.[17]

Appellant submits that its position relative to Article 3(1) must be sustained, that it proved negligence, and that, therefore, this court should remand for entry of judgment in the amount of $375,000 as found by the District Court. The District Court, however, as well as finding that appellee was not guilty of wilful misconduct, found that appellee was not even negligent. If this conclusion is supportable, it is final and there is no need for us to examine appellant's legal contentions concerning Article 3(1) of the Convention, which we have set forth in the foregoing paragraph, for even if those contentions are determined in favor of appellant, they would not dictate a reversal.

The issues of appellee's wilful misconduct and negligence are bound together in this case, for appellant's theories of the cause of the accident would have been the basis for proving both, and the burden of such proof as to both remained with appellant as plaintiff.[18]

As to appellee's theory that jets entered the ILS glide slope of the Eastern constellation, and the District Court's acceptance of it as the probable cause of the accident, it appears that the evidence supporting it is exceedingly thin. It is unnecessary in this instance to finally resolve whether such a finding is supported by substantial evidence in the record for, even absent such a finding, we are

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17 For discussions of the legal consequences of a failure to comply see Mertens v. Flying Tiger Line, Inc., 341 F.2d 851 (2 Cir. 1965); Grey v. American Airlines, *supra* note 13 at 284, *affirming* 95 F. Supp. 756 (S.D.N.Y. 1950); Lisi v. Alitalia-Linee Aeree Italiane, 253 F. Supp. 237 (S.D.N.Y. 1966).

It is in passing noteworthy that in *Mertens* the plaintiff had assumed that the burden was upon him to prove defendant's failure to comply with Article 3(1).

18 Grey v. American Airlines, *supra* note 13 at 285-86.

satisfied that the record supports the District Court's conclusion that appellant failed to prove conduct of the appellee that was either wilful or negligent, and the proximate cause of the accident. Such independent proof would have been essential to appellant's recovery.

Though medical deficiencies of the pilot and co-pilot were demonstrated, the District Court chose not to draw an inference from this fact that a triggering of known physical disabilities was the cause of the air mishap. It had the right as the trier of fact to refuse to draw such an inference. As there was no other evidence introduced to show either a physical malfunction of the pilot or co-pilot or that such a malfunction was the probable cause of the accident, the District Court's finding that this theory could not be sustained as the probable cause of the accident is not clearly erroneous.

Appellant's alternative theory that the pilot knowingly attempted an illegal "sneak-in" below the cloud ceiling in violation of minimal altitude requirements rested solely on the answers to hypothetical questions put to three expert witnesses by appellant. Appellant's experts' answers to the hypotheticals all concluded that the pilot must have been attempting the theorized illegal "sneak-in". Appellee's experts testified that it was not possible to draw such a conclusion from the hypothetical facts. The District Court chose not to believe appellant's experts. Its impression of appellant's experts as stating overly partisan, highly speculative, and unqualified opinions was a permissible determination of credibility by the fact finder. Thus, as the testimony of the expert witnesses was the only basis for appellant's "sneak-in" theory, the District Court's refusal to believe it, particularly in the light of contrary expertise, was well within its province as fact finder.

The initial observation of the District Court that the evidence as to causation was meager and incomplete would appear to have substantial support in the record. Its con-

clusion that the evidence was not sufficient for the appellant, as plaintiff, to have sustained the requisite burden of proof on the question of appellee's wilful misconduct or negligence was not clearly erroneous. The resolution of this issue which is fundamental to the litigation, against appellant, precludes the necessity for our determining the numerous subsidiary issues it has raised, as noted heretofore.[19]

The District Court entered judgment in favor of appellant, but for the limited Convention liability of $8300. Appellee did not contest this entry of judgment. Indeed, it tendered the $8300 prior to judgment and has taken no cross-appeal. The judgment of the United States District Court for the Eastern District of Pennsylvania of September 30, 1964 will, therefore, be affirmed.

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BIGGS, *Chief Judge*, concurring.

I concur in the result reached by Judge Forman and in all that he has said save for one statement. His opinion states: "As to appellee's theory that jets entered the ILS glide slope of the Eastern constellation, and the District Court's acceptance of it as the probable cause of the accident, it appears that the evidence supporting it is exceedingly thin." I shall not discuss the evidence that formed the basis for the District Court's acceptance of the theory that jets entered the ILS glide slope of the Eastern constellation since it is not relevant to the decision of this case, but I cannot agree with Judge Forman's statement that the evidence supporting such a theory is "exceedingly thin".

19 This disposition also makes it unnecessary to consider appellee's cross-assignment of error concerning the District Court's grant of appellant's new trial motion subsequent to the fourth trial and the jury verdict in appellee's favor.

KALODNER, *Circuit Judge*, dissenting.

I would reverse the Judgment of the trial court and remand with directions to grant a new trial for these reasons:

1. Inconsistent fact-findings were made by the trial court on the score of the defendant's negligence; it expressly found that the plane crash was due to a sudden emergency created by "the highly probable presence and actions of jet aircraft" and that as a consequence the defendant was free of all fault or negligence, and then, in awarding $8300 damages to the plaintiffs, it implicitly found that the defendant was negligent since such an award could only have been made under the Warsaw Convention on a finding of negligence. It is settled that where fact-findings are inconsistent either with one another, or with the verdict, that a new trial must be granted. Freightways, Inc. v. Stafford, 217 F.2d 831, 835 (8 Cir. 1955); Rule 49(b) Federal Rules of Civil Procedure.

2. The trial court's fact-finding that the crashing of the plane was due to a sudden emergency created by "the highly probable presence and actions of jet aircraft" was against the overwhelming weight of the evidence; it could not have been reasonably made under the evidence.

3. The stated fact-finding as to the "probable" presence of jets was clearly on its face speculative. It is settled that "mere speculation" cannot "be allowed to do duty for probative facts." Galloway v. United States, 319 U.S. 372, 395 (1943); Noel v. United Aircraft Corporation, 342 F.2d 232, 239 (3 Cir. 1965).

4. The trial court erred as a matter of law in ruling that the explicit testimony of plaintiffs' witnesses—airport control tower operators and naval and air force officers—that jets were *not* present at the time of the crash, was *negative* proof which "did not balance or outweigh the

*affirmative* testimony" of the defendant's witnesses that they saw and heard jets. It is settled that where a witness is so circumstanced that he is able to testify as to non-presence of a thing, his testimony is *affirmative:* Eiseman v. Pennsylvania R. Co., 151 F.2d 222 (3 Cir. 1945); Enfield v. Stout, 400 Pa. 6 (1960); Wigmore on Evidence, (3rd ed.) 777 § 664.

5. The trial court's expressed admission that "The actual cause of the crash of Flight 642 cannot be determined on the record before me" evidenced a "hung-jury" situation which required it to abstain from reaching a verdict and to direct a new trial. Where a jury cannot reach a verdict as to how an accident happened it is a "hung-jury". The trial court, to which the case was tried without a jury, was a "jury". Allen v. St. Louis Bank, 120 U.S. 20, 30 (1887).

The majority has not adverted to any of the stated points nor does its opinion indicate an awareness of their existence.

It has confined its consideration to the single point as to whether the record supports the trial court's finding that the defendant *"was not even negligent"*, and has found on that score that "the record supports the District Court's conclusion that *appellant* [plaintiffs] *failed to prove conduct of the appellee* [defendant] *that was either wilful or negligent*, and the proximate cause of the accident", and *"Such independent proof* would have been essential to appellant's recovery". (emphasis supplied)

The majority has by-passed resolution of the critical question as to whether the evidence supports the trial court's finding that the accident was caused by a sudden emergency due to the "probable presence and actions of jet aircraft", even though it concedes that the evidence as to the presence of jets "is exceedingly thin", for the assigned reason that the plaintiffs failed to meet their burden to prove even negligence.

The majority errs in its view that the plaintiffs bore the burden to prove negligence.

The Warsaw Convention, 49 Stat. 3,000 et seq., provides in Article 17 [1] that where a passenger is killed or injured aboard a plane "the carrier shall be liable for damage sustained", and Article 20(1) [2] imposes the burden of the carrier to prove that it has "taken all necessary measures to avoid the damage or that it was impossible" for it to take them. We specifically noted these provisions when the instant case was before us on a prior appeal. Berguido v. Eastern Air Lines, Incorporated, 317 F.2d 628, 629 (1963).[3] It is undisputed that Article 17 "creates a *presumption* of liability from the happening of the accident." [4] The late Secretary of State Hull, in a letter dated

1 Article 17 of the Warsaw Convention provides as follows:

"The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident causing the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

2 Article 20(1) of the Convention provides:

"The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

3 In Berguido v. Eastern Air Lines, Incorporated, 317 F.2d 628 (3 Cir. 1963), Judge McLaughlin, speaking for this Court, said at page 629:

"The Warsaw Convention provides, inter alia, that the carrier is absolutely liable for all injuries where the accident causing the damage so sustained takes place on board the aircraft. Article 17. In such circumstances the liability of the carrier for each passenger is limited to 125,000 francs (approximately $8,300). Article 22(1). In order to escape that liability, the carrier has the burden of proving that it has taken all necessary measures to avoid the damage or that it was impossible for it to take them. Article 20(1). On the other hand, if the plaintiff sustains his burden of proving that the damage is caused by the 'wilful misconduct' of the carrier, '[t]he carrier shall not be entitled to avail himself of the provisions of this convention which exclude [Art. 20(1)] or limit [22(1)] his liability.' Article 25(1)."

4 In Komolos v. Compagnie National Air France, 111 F. Supp. 393, 401 (S.D.N.Y. 1952), rev'd on other grounds, 209 F.2d 436 (2 Cir. 1953), cert. den. 348 U.S. 820 (1954), the court stated: "The Convention creates a *presumption* of liability from the happening of the accident. Art. 17. It gives the carrier complete exoneration from liability if the carrier can prove that it took all necessary measures to avoid the damage." See also Wyman v. Pan American Airways, Inc., 43 N.Y.S.2d 420, 422 (1943); Ritts v. American Overseas Airlines, Inc., 1949 U.S. Av. 65 (S.D.N.Y. 1949).

March 31, 1934, addressed to the President, recommending adherence to the Convention, pointed out that Article 17 of the Convention creates a presumption of negligence against the carrier.[5]

The majority errs in the further respect that in holding that "the record *supports the District Court's conclusion that appellant failed to prove conduct of the appellee that was either wilful or negligent*", it disregards the hard fact that the trial court *did find the defendant negligent* when it returned a verdict of $8300 against the defendant. As earlier stated, such an award could only be made under the Warsaw Convention when a carrier is negligent.

The fact of the matter is that the defendant has not on this appeal challenged the finding of negligence implicit in the $8300 award; to the contrary, it seeks affirmance of that award.

Moreover, the defendant stresses in its brief that the issue of negligence was not even at issue at the trial; that the only issues were the defendant's wilful misconduct and the applicability of the liability limitations of the Warsaw Convention.

What has been said brings us to the consideration of the trial court's fact-findings that the "*presence and action of jet aircraft*" during the plane's landing maneuvers "threatened or interfered with the approach of Flight 642, *bringing about emergency conditions and accident resulting in the crash without willful misconduct, negligence or fault on the part of the defendant* or any member of the crew of Flight 642"; and that the plane's crew had not "under other than emergency conditions knowingly and intentionally brought the plane to a position below the minimums prescribed for an ILS approach."

Discussion of the evidence relating to the presence or action of jets must be prefaced by a brief statement of the

5 Secretary Hull said: "The effect of Article 17 (ch. III) of the Convention is *to create a presumption of liability against the aerial carrier on the mere happening of an accident* occasioning injury or death of a passenger subject to certain defenses allowed under the Convention to the aerial carrier. 1934 U.S. Av. 240, 243." (emphasis supplied)

plaintiffs' contentions with respect to the crashing of the plane, and the scope of our review of the trial court's fact-finding that jets created a sudden emergency.

First as to the plaintiffs' contentions:

One of the two[6] alternative theories presented below by the plaintiffs as to the issue of defendant's wilful misconduct, was that the plane crashed while it was attempting a "sneak-in" landing, viz., dropping down through a low cloud ceiling into a position below the authorized Instrument Landing System (ILS) approach minimum in violation of Civil Air Regulations. The majority concedes that such a "sneak-in" maneuver would constitute not only negligence but wilful misconduct as well and I agree.

Second, as to the scope of our review as to the trial court's fact-findings with respect to jets:

The defendant's evidence as to the presence of jets was presented below on depositions. The defendant's evidence as to the nonpresence of jets was also presented on depositions, with but one exception. It is settled that under such circumstances this Court can review and evaluate a finding based on deposition testimony free of the impact of the "clearly erroneous" rule. Mobil Tankers Company, S. A. and Socony Oil Company, Inc. v. Mene Grande Oil Company, 363 F.2d 611, 613 (3 Cir. 1966)[7] and the cases therein cited.

Coming now to the testimony as to the presence or nonpresence of jets which must be considered in the light of the undisputed fact that the only jets in existence at

6 The other alternative theory was that both the pilot and co-pilot had submarginal heart conditions which caused or contributed to the plane's crashing. I agree with the majority's view that the trial court's rejection of this theory cannot be said to be "clearly erroneous".

7 We there said "Meneg argues that the lower court's findings of fact are presumptively correct and our right to review them is circumscribed by the 'clearly erroneous' rule. This rule is inapplicable in the instant case. Since the matter was presented to the lower court on affidavits without oral testimony the findings of fact are reviewable free of the impact of the rule. . . . We are in as good a position as was the trial court to evaluate the evidence, draw the inferences of which the evidence is reasonably susceptible, and decide the critical questions raised on this appeal". 363 F.2d 613.

the time of the plane crash here involved were naval and military jets:

The defendant's testimony as to the presence of jets was adduced in the depositions of three witnesses.

Donald Wheeler said in his deposition that he saw "a silhouette of what looked to be two jets" and heard the sound of jets while he was driving his truck near the Airport at the time of the crash; he walked over to the burning plane but did not report his "observation to anyone at the scene of the accident"; he, however, told his father-in-law, an employee of the defendant, about it the next day.

Mrs. Marian A. Farrish said in her deposition that she lived a 20-minute drive from the crash; she heard but did not see a commercial aircraft and jets; she could not explain why in her earlier testimony before the Civil Aeronautics Board she had testified that she heard only jets and not any other type plane.

Mrs. Fred Lubin said in her deposition that she lived two miles from the Airport; *she heard but did not see* both a passenger plane and a "jet or jets" just before the accident.

The plaintiffs' testimony as to the jet issue was as follows:

Rear Admiral John Francis Greenslade testified in his deposition that in January 1956 he was a Captain of the United States Navy, and Director of Flight Service Division in the Office of Chief of Naval Operations; at the request of the Chief of the Investigation Division of the Civil Aeronautics Board he made a check to ascertain whether there were any Navy jets aloft in the vicinty of Jacksonville, Florida between 12 A.M. and 6 A.M. December 21, 1955 (the crash occurred at 3:41 A.M. December 21, 1955); he made the check requested and found that at the specified period no naval jets were in operation in the area of Jacksonville.

Major Robert J. Tobin of the United States Air Force testified in his deposition that in January 1956 he made

a check at the request of the Inspector General and the Civil Aeronautics Board as to whether there were any military jets aloft in the vicinity of Jacksonville at the time of the crash and ascertained that there were neither military nor naval jets.

William T. McKinney, employed by the Civil Aeronautics Board as airways operations specialist (tower operator) in the control tower of the Jacksonville Airport, testified in his deposition that he was on duty between midnight and 8 A.M. December 21, 1955, together with Lawrence B. Robison, a control tower operator; he saw no jets or aircraft other than the doomed plane on his radar scope.

Robison in his deposition testified to the same effect; moreover, that he neither saw nor heard any jet or aircraft other than the defendant's plane, prior to or at the time of the crash.

Carl Alton Anderson, a Jacksonville policeman, testified in his deposition that he was on duty at the Airport at the time of the crash and that he did not "hear a jet aircraft that night".

Franklin Cardwell, a National Airlines flight engineer, with some 20 years experience, gave this oral testimony at the trial: he lived across the street from defendant's witness Farrish: he heard one Constellation plane (defendant's plane was a Constellation), and it was the only plane aloft at the time; he was familiar with the sound of jet engines; he did not hear a jet and had there been a jet in the air he would have heard since he was listening; he had testified to that effect at the CAB hearing.

The trial court credited the testimony of the defendant's witnesses as to the presence of jets. In doing so it said:

"To me, *affirmative testimony* as to seeing objects and hearing sounds, when unequivocal, reasonable and ringing true to the trier of fact is far more persuasive than testimony that said sights or sounds were not seen

or heard by other witnesses having opportunity and occasion to see and hear.

"On this subject, the *negative testimony in this case,* whether taken singly or as a whole, in my mind *does not balance or outweigh the affirmative testimony.* The testimony of Greenslade and others to the effect that no military jets were reported or recorded as operating in the Jacksonville area at the time, while given full consideration, does not convince me that jet aircraft were not or could not have been seen and heard at the time and place indicated in the testimony of Wheeler, Lubin and Farrish." (emphasis supplied)

It is obvious that the trial court cleared the decks, so to say, for its crediting of the testimony of the defendant's witnesses by its erroneous categorization of their testimony as *affirmative* and the countervailing testimony of the plaintiffs' witnesses as *negative.*

As earlier stated, the trial court erred as a matter of law in categorizing the testimony of the plaintiffs' witnesses as "negative". Also, as already said, the trial court's fact-findings as to the presence of jets was against the overwhelming weight of the evidence of competent and disinterested witnesses and they could not have been reasonably made by a fact-finder.

The defendant in its brief[8] candidly admits that the evidence did not "conclusively" prove that the accident was caused by "interference from jet aircraft"; that "no one has yet proved why" the plane crashed; that the cause of the crash was an "unpenetrable mystery"; and that "After Judge Boldt sat through 1200 pages of testimony, read 27 depositions, and examined over 50 exhibits, he decided *'The actual cause of the crash of Flight 642 cannot be determined on the record before me. . . .'*"[9]

The defendant's position here presents a baffling anomaly in another respect, viz., it seeks an affirmance of

8 Pages 15 and 16, Appellee's Brief.

9 Para. 4 of the trial court's "firm findings and conclusions".

the trial court's award of $8300 with its implicit fact-finding that the defendant was negligent, in patent disregard of the circumstance that the trial court's fact-findings that jets created a sudden emergency which caused the plane crash "without willful misconduct, negligence or fault on the part of the defendant", made it mandatory for the trial court to render a verdict in favor of the defendant under Article 20 of the Warsaw Convention,[10] which absolves a carrier from all liability where a sudden emergency causes an accident.

The majority's disposition reflects the same anomaly in that it affirms a judgment based on a finding that a sudden emergency caused the plane crash without wilful misconduct or negligence on the part of the defendant which required rendition of a verdict for the defendant, and at the same time it inconsistently affirms a judgment which awards the plaintiffs $8300 for negligence.

In summary, I would reverse the Judgment of the trial court and remand for a new trial because of the inconsistency of fact-findings and verdict; the speculative and clearly erroneous fact-findings as to the jets; the erroneous legal standard applied by the trial court with respect to *affirmative* and *negative* evidence, and last, but not least the inescapable fact that this was a "hung-jury" requiring abstention from reaching a verdict and granting of a new trial, inasmuch as the trial judge expressly concluded that "The actual cause of the crash of Flight 642 cannot be determined on the record before me".

This must be added.

The plaintiffs here contend that the liability limitations of $8,300, absent wilful misconduct, of Article 22(1) of the Convention are inapplicable under Article 3(2) because the defendant failed to deliver a passenger ticket to their decedent which adequately advised him of the limitation of liability provision as required by Article 3(1)(e). Under the cited provisions of Article 3 ". . . the carrier must deliver a passenger ticket which shall contain . . . a state-

10 See Note 2.

ment that the transportation is subject to the rules relating to liability established by this convention."

The majority did not dispose of this contention for the assigned reason that it finds, albeit erroneously, that plaintiffs had failed to meet their burden to prove even negligence on the defendant's part.

While I, too, do not reach this contention, because of my opinion that a new trial must be granted for the reasons earlier stated, I nevertheless feel constrained to express a view as to it should a new trial be granted, as it should.

In the instant case, the passenger ticket, in a footnote on its face [11] stated:

> "Carriage/Transportation under this Passenger Ticket and Baggage Check, hereinafter called 'ticket', is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules Relating to International Carriage/Transportation by Air signed at Warsaw October 12, 1929, if such carriage/transportation is 'international carriage/transportation' as defined by said Convention."

In a recent case, a similar footnote on a plane passenger ticket was held not to be in compliance with the requirement of the notice provisions of Article 3(1)(e) of the Convention, Lisi v. Alitalia-Linee Aeree Italiane, 253 F. Supp. 237 (S.D.N.Y. 1966).

It was there said at page 243:

> "The footnotes printed in miscroscopic type at the bottom of the outside front cover and coupons, as well as condition 2(a) camouflaged in Lilliputian print in a thicket of 'Conditions of Contract' crowded on page 4, are both unnoticeable and unreadable. Indeed, the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth

11 Only the face of the passenger ticket was in evidence.

is that they are so artfully camouflaged that their presence is concealed.

" 'Lilliputian typography,' Eck v. United Arab Airlines, Inc., 20 App. Div. 2d 454, 457, n.2, 247 N.Y.S.2d 820, 824, rev'd on other grounds, 15 N.Y.2d 53, 255 N.Y.S.2d 249, 203 N.E.2d 640 (1964), which must be read through 'a magnifying glass,' Warren v. Flying Tiger Line, Inc., 234 F. Supp. 223, 230 (S.D. Cal. 1964), aff'd, 352 F.2d 494 (9th Cir. 1965), is at war with the intent of the Convention. This was recognized by our Court of Appeals in *Mertens* where one of the reasons for precluding the carrier from limiting its liability under the Convention was that the required statement 'was printed in such a manner as to virtually be unnoticable and unreadable * * *.' Mertens v. Flying Tiger Line, Inc., supra, 341 F.2d at 857."

I agree with the holding cited.

I would go further, and hold that assuming the footnote notice, as framed, was printed in readily discernible manner, that it would not satisfy the plain intent of the Convention that a passenger should be adequately advised by his ticket that the carrier's liability was limited by the Convention to $8,300, absent wilful misconduct on the carrier's part.

The rationale of such a holding can be briefly stated. A plane passenger is not put on notice of the $8,300 liability limitation by an abbreviated statement that his carriage "is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules Relating to International Carriage/Transportation by Air signed at Warsaw October 12, 1929. . . ."

Passengers on an international flight are not expected to carry with them a copy of the Warsaw Convention. See Lachs v. Fidelity & Casualty Co. of New York, 306 N.Y. 357 (1954), 118 N.E.2d 555 where it was said of a contract of flight insurance:

"We all know that a contract of insurance, drawn by the insurer, must be read through the eyes of the average man on the street or the average housewife who purchases it. Neither of them is expected to carry the Civil Aeronautics Act or the Code of Federal Regulations when taking a plane". 118 N.E.2d 558.

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*Clerk of the United States Court of Appeals for the Third Circuit.*

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IN THE

# Supreme Court of the United States

October Term, 1967.

## No. 528.

MARION J. BERGUIDO, Individually, MARION J. BERGUIDO, ROBERT G. ROWE and WARREN H. WOODRING, Executors of the Estate of CARLOS BERGUIDO, JR., and JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO and CARLOS BERGUIDO, 3rd, by Their Guardian, MARION J. BERGUIDO,

*Petitioners,*

*v.*

EASTERN AIRLINES, INCORPORATED,

*Respondent.*

## MOTION FOR CONSOLIDATION.

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 528.

MARION BERGUIDO, ET AL.,

*Petitioner,*

*v.*

EASTERN AIR LINES, INC.,

*Respondent.*

## MOTION FOR CONSOLIDATION.

The motion of Marion Berguido, et al., petitioners in the above matter respectfully represents:

1. That they are the petitioners for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, now docketed and indexed in this Court as No. 528.

2. That her cause of action centers around an action brought in the United States District Court for the Eastern District of Pennsylvania to recover damages for the death of her husband under the Warsaw Convention, 49 Stat. 3000, arising out of the crash of an airplane on which he was a passenger on an international flight.

3. That the most important issues before the Court presented by the Petition for Certiorari filed in this case is the effect of non-compliance by the carrier with Chapter II, Article 3(1), (2) of the Warsaw Convention relating to ticketing. The issue is whether such non-compliance deprives the carrier of the ability to divest itself of the absolute liability imposed by Article 17 since the ticket failed to contain the enumerated data required by Article 3(1) and was printed in very fine small type which rendered it illegible.

4. That there is pending before this Court at this time a Petition for Certiorari directed to the United States Court of Appeals for the Second Circuit, raising the identical questions of law, in which this Court has prior to taking action on the said Petition requested the view of the Solicitor General. The Solicitor General has expressed his views as to such non-compliance in ticketing set forth in the sections of the Convention just adverted to. The said case is *Alitalia, etc. et al. v. Lisi,* docketed and indexed in this Court as case No. 1169. This will mean that the Court will be able to, and we respectfully urge that it should dispose of both cases at one and the same time as they revolve around the exact same issues. The only difference between the cases is that in No. 1169 arising from the Court of Appeals for the Second Circuit the decedent's family prevailed, whereas in the instant case arising out of the Court of Appeals for the Third Circuit that turned on the same question of law, that family did not. Thus a clear conflict exists between the Second and Third Circuits in which case under the authority of *U. S. v. Minker,* 350 U. S. 179, 180 (1956) certiorari should be granted.

WHEREFORE Marion Berguido, et al., petitioners, respectfully request that the two Petitions for Certiorari be consolidated by the Court for the determination of the grant or non-grant of certiorari and/or argument if it be deemed necessary to be held and heard, that they be disposed of at one and the same time so that there may be uniformity of decision and an expedition of the time and work of the Court.

AND SHE WILL EVER PRAY.

Respectfully submitted,

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SEP 16 1967
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 528

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—v.—

EASTERN AIRLINES, INCORPORATED,

*Respondent.*

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## BRIEF OF RESPONDENTS IN *ALITALIA* v. *LISI*, NO. 1169 (1966) IN OPPOSITION TO MOTION FOR CONSOLIDATION

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 528

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MARION J. BERGUIDO, Individually, MARION J. BERGUIDO, ROBERT G. ROWE and WARREN H. WOODRING, Executors of the Estate of CARLOS BERGUIDO, JR., and JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO and CARLOS BERGUIDO, 3rd, by Their Guardian, MARION J. BERGUIDO,

*Petitioners,*

—v.—

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*Respondent.*

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## BRIEF OF RESPONDENTS IN *ALITALIA* v. *LISI*, NO. 1169 (1966) IN OPPOSITION TO MOTION FOR CONSOLIDATION

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### THE ISSUES OF FACT AND LAW ARE ENTIRELY DIFFERENT IN THESE CASES, AND THERE IS NO CONFLICT BETWEEN THE APPELLATE COURTS

It should be preliminarily noted that the moving *Berguido* Petitioners failed to serve copies of their petition, briefs and record upon the undersigned.

1. Upon information and belief, there is no passenger ticket (which normally contains the contract or conditions of carriage) in the record in the *Berguido* case and no such passenger ticket was ever submitted to the court below. Flight segment coupons are only a part of the ticket.

2. In *Lisi,* the legibility and sufficiency of the actual ticket was submitted to the court by both sides as a matter of law. Both the district court and the Court of Appeals examined the *Alitalia* ticket and held that the ticket as such did not comply with the notice requirements of the Warsaw Convention. The question was originally presented to the district court in a motion by plaintiff for partial summary judgment, and came before the Court of Appeals, Second Circuit, after leave to appeal was duly granted following certification by the district court.

On the other hand, in *Berguido,* there was no ticket, nor ticket legibility issue, nor could there be any finding of fact or law by either the trial court or by the Court of Appeals, Third Circuit, that the ticket and its printed matter, if any, was legible or illegible. It is respectfully submitted that the Court of Appeals in *Berguido* did not rule upon this point, and there is no conflict of decision with *Lisi,* nor identity of facts or issues.

3. In an effort to identify with *Lisi,* the Petitioners, in effect, are now asking that the United States Supreme Court adjudicate in the first instance an issue of fact of legibility of a ticket not in evidence and which has not even been passed upon by (nor submitted to) the lower courts, and to employ a procedure which is normally the province of the lower court.

4. Consolidation of these actions would be harmful to and confuse the position of the *Lisi* Plaintiff-Respondents who are strenuously opposing granting of Certiorari in the *Lisi* case. In fact, the Government of the United States has already filed a brief in *Lisi,* supporting plaintiff-respondent's position and recommending that Certiorari be there denied.

5. Upon information and belief, there are a multiplicity of issues of fact, law, and procedure in the complex record after trial in the *Berguido* case, whereas in *Lisi,* there was a single simple issue of law involved, arising in a motion directed solely to that point and submitted to the court by both sides. Consolidation would seriously prejudice the *Lisi* respondents.

WHEREFORE it is respectfully submitted that the motion for consolidation be denied, and that the petition for a Writ of Certiorari in *Alitalia* v. *Lisi,* No. 1169, (1966) be denied.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

October Term, 1967.

## No. 528.

MARION J. BERGUIDO, Individually, MARION J. BERGUIDO, ROBERT G. ROWE and WARREN H. WOODRING, Executors of the Estate of CARLOS BERGUIDO, JR., and JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO and CARLOS BERGUIDO, 3RD, by Their Guardian, MARION J. BERGUIDO,

*Petitioners,*

*v.*

EASTERN AIRLINES, INCORPORATED,

*Respondent.*

**Respondent's Brief and Appendix in Opposition to the Petition for Certiorari and to the Motion to Consolidate With Lisi, et al., Docket No. 70.**

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## INDEX.


| | Page |
|---|---|
| Opposition to Motion and Summary of Argument | 1 |
| Opinions Below | 3 |
| The Convention Involved | 3 |
| Statement of Questions Presented | 3 |
| Statement of the Case | 4 |
| Argument | 7 |
| 1. Certiorari Should Not Be Granted to Review Legal Questions Based on "Facts" Not in the Record | 7 |
| 2. The Decision Below Does Not Conflict With Lisi or Any Other Case | 13 |
| 3. This Court Should Not Grant Certiorari to Find Facts | 19 |
| 4. To Grant Review Would Be Futile | 19 |
| Conclusion | 22 |

## TABLE OF CITATIONS.

**Cases:**


| | Page |
|---|---|
| Alitalia-Linee Aeree Italiane S. p. A. v. Lisi, Appellate Docket No. 70, 370 F. 2d 508 (2d Cir. 1966) | 1, et seq. |
| Cochran v. B. & O. Railroad Company, 340 F. 2d 709 (3rd Cir. 1965) | 14 |
| Gibson v. Lockheed Aircraft Service, Inc., 350 U. S. 356 (1956) | 20 |
| In re Linda Coal and Supply Co., 255 F. 2d 653 (3rd Cir. 1958) | 14 |
| Kline v. S. M. Flickinger Co., 314 F. 2d 464 (3rd Cir. 1963) | 14 |
| Mercer v. Theriot, 377 U. S. 152 (1964) | 20 |
| Mertens v. Flying Tiger Line, Inc., 341 F. 2d 851 (2d Cir. 1965), cert. denied, 382 U. S. 816 | 12, 15, 21 |
| Payne v. S. S. Nabob, et al., 302 F. 2d 803 (3rd Cir. 1962), cert. denied, 371 U. S. 870 | 14 |
| Quinones v. Township of Upper Moreland, 293 F. 2d 237 (3rd Cir. 1961) | 14 |
| Wiggins v. City of Philadelphia, 331 F. 2d 521 (3rd Cir. 1964) | 14 |


**Rules:**


| | |
|---|---|
| Fed. R. Civ. Proc.: | |
| Rule 16 | 14, 21 |
| Supreme Court: | |
| Rule 19 | 2, 19 |
| Rule 23 | 3 |
| Rule 40 | 10, 11, 13 |
| Court of Appeals (3rd Cir.): | |
| Rule 24 | 14 |


**Texts:**


| | |
|---|---|
| Stern and Gressman, Supreme Court Practice (2nd Ed. 1954), p. 198 | 11 |

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 528.

MARION J. BERGUIDO, INDIVIDUALLY, MARION J. BERGUIDO, ROBERT G. ROWE AND WARREN H. WOODRING, EXECUTORS OF THE ESTATE OF CARLOS BERGUIDO, JR., AND JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO AND CARLOS BERGUIDO, 3RD, BY THEIR GUARDIAN, MARION J. BERGUIDO,

*Petitioners,*

*v.*

EASTERN AIRLINES, INCORPORATED,

*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI AND TO THE MOTION TO CONSOLIDATE WITH LISI, et al., DOCKET NO. 70.

## OPPOSITION TO MOTION AND SUMMARY OF ARGUMENT.

Respondent, Eastern Air Lines, Inc., opposes the motion to consolidate the present case with *Alitalia-Linee Aeree Italiane S. p. A. v. Lisi,* Appellate Docket No. 70 (370 F. 2d 508, 2d Cir. 1966),[1] which has been pending in this court. The parties are different; the questions presented to the respective courts below were different (*infra* pp. 11-

1. This case is hereafter called *Lisi.*

12; 14-15); the record facts are different (*infra* pp. 11-13); the holdings are different (*infra* pp. 11-12; 13-19).

Since the present petition for certiorari is an attempt to establish similarity between the two cases, consolidation would be justified only if the petition is a fair representation of the record below and established the similarity. It is not and does not.

Certiorari in the instant case should be denied because:

(1) This is not a Warsaw Convention ticket case. The ticket is not in evidence and no issue about it was ever tried during the eleven years this case has been pending (*infra* pp. 7-13).

(2) The Petition lacks candor. It does not state the case as required by Rule 23(e), and the forty-page argument, which develops "reasons for granting the writ", misinforms this court about the record below (*infra* pp. 7-13) the holding below (*infra* pp. 18-19) and the position petitioner took in the courts below (*infra* pp. 13-15).

(3) Apart from its holding that Articles 17 and 22 of the Warsaw Convention must be read "in pari materia" (Petition, p. 71), the Court of Appeals neither interpreted the Convention nor decided that under it a plaintiff must prove negligence. It held merely that, under the evidence, petitioner [2] would lose even on his own argument about the law (*infra* pp. 13-19).

This brief describes the very prolonged litigation and documents the truth of the foregoing propositions which, we submit, demonstrate that this case is not one for review. SUPREME COURT RULE 19. Other reasons for denying the petition are argued at the end of the brief (*infra* pp. 19-21). The arguments are short enough to constitute their own summary.

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2. In this brief the words plaintiff, appellant, petitioner, include the plural and often refer to counsel.

## OPINIONS BELOW.

Petitioner did not append the opinion of the trial judge [Rule 23(i)], even though fifteen pages of the argument criticizes his findings of fact. His opinion is Appendix A to this brief.

## THE CONVENTION INVOLVED.

Pertinent provisions of the Warsaw Convention not printed by petitioner [Rule 23(d)] are Appendix B to this brief.

## STATEMENT OF QUESTIONS PRESENTED.

Should certiorari be granted to review a decision of a court of appeals where

1. The facts upon which the petition for certiorari is predicated are nowhere in the record;

2. The Court of Appeals held that, on the state of the appellate record and the evidence at trial, it was not necessary to decide the question which petitioner presents to this court;

3. The decision of the Court of Appeals conflicts neither directly nor indirectly with any other decision, since the court affirmed the judgment below upon the unique trial and appellate record before it and did not resolve any important question of substantive law;

4. The petition requests this court to re-evaluate evidence and to set aside findings of fact made by a district judge duly affirmed by a court of appeals; and

5. There are multiple grounds, undecided by the court below and not even mentioned in the petition, which would require affirmance of the judgment if the case were reviewed?

## STATEMENT OF THE CASE.

"This was an action commenced in 1956 (1a) to recover for the death of Carlos Berguido, a Philadelphia lawyer specializing in international law, who was a passenger on an Eastern Air Lines international flight which crashed near Imeson Airport, Jacksonville, Florida, on December 21, 1955.

The complaint, tacitly recognizing that the flight was subject to the Warsaw Convention, alleged, in the words of the Convention, that Eastern was guilty of "wilful misconduct or . . . default . . . equivalent to wilful misconduct" (Article 25(1) of the Convention, Petition, p. 7; Complaint, 18a). No other ground for recovery was stated.

Trials were started twice in May, 1961 (6a) but both resulted in mistrials, the first because the trial judge thought one of plaintiff's witnesses was trying unfairly to prejudice the jury against defendant, and the other because plaintiff's lawyer said he was sick.

Commencing in October, 1961, the case was tried and plaintiff obtained a verdict based on inadmissible evidence, hearsay conclusions made to the Civil Aeronautics Board. The Court of Appeals reversed (317 F. 2d 628) and this court denied plaintiff's petition for a writ of certiorari (375 U. S. 895). Later it became apparent that the "expert" testimony supporting plaintiff's verdict came from men who lacked disinterest, objectivity, reliability and expertise and who expressed incredible, unqualified, highly speculative and conjectural opinions.[3]

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3. These were the observations of visiting Judge George H. Boldt, who presided at the last trial and heard plaintiff's three "experts" for hours of detailed testimony. Judge Boldt is a man of immense talent, highly perceptive, courteous but firm with counsel, fair, knowledgeable and hard working. He knows the law. He understands witnesses and the differences between substantial and equivocal evidence. He is the epitome of the good trial judge. The entire record of the trial

The re-trial took three weeks, and defendant exercised the "opportunity to cross-examine" (317 F. 2d at 632) which it was denied before. That examination demonstrated that the hearsay conclusions introduced earlier were highly speculative. The opinion testimony of plaintiff's witnesses was not accepted. The jury found that there was no wilful misconduct.

Accordingly judgment was entered for plaintiff in the amount of $8,300, the sum prescribed by the Warsaw Convention.

Chief Judge Clary, reversing the exercise of his own discretion during the trial and relying upon "errors" which were not preserved for review prior to the verdict, granted plaintiff a new trial.

Defendant petitioned for a writ of mandamus and prohibition arguing that the Chief Judge had exceeded his power. Under Amendment 7 of the United States Constitution no fact tried by a jury can be "reexamined" as the District Court did. The Court of Appeals, without an opinion, denied the petition. A petition for reargument was also denied with Chief Judge Biggs dissenting. Apparently the court never reached the merits of defendant's attempt to get review of Judge Clary's action.

Thereafter the case was assigned to the Honorable George H. Boldt visiting in the Eastern District of Pennsylvania from the District of the State of Washington. The parties agreed to try the action non-jury. They waived entry of findings of fact and conclusions of law and agreed that Judge Boldt's decision might be limited to a general finding, either for or against liability and in a single total sum fixing damages (A23—referring to Appendix A to this brief), just as a jury would do in a verdict. They agreed that such a finding would be deemed the same as a jury

---

before him, from his careful narrowing of the issues at a pre-trial conference through his most articulate opinion (Appendix A to this brief), is a credit to our judicial system and bears out fully these statements about him.

verdict, and that all rules applicable to a verdict would be applicable to such a finding (112a-113a).

At a pre-trial conference, with the complete agreement of plaintiff's counsel, the legal issues were narrowed to the questions, did the Warsaw Convention apply and was there wilful misconduct within its scope?

Judge Boldt heard testimony, considered myriad exhibits, and read many depositions through eight full days of trial. He heard argument from counsel for a full day. He made a mixed finding of fact and law that the Warsaw Convention applied to the flight in question (A25). He found that plaintiff did not sustain the burden under that Convention of establishing defendant's wilful misconduct (A27; A28-9). Accordingly judgment was entered for plaintiff for the $8,300 prescribed by the Convention.

Judge Boldt undertook to make all findings necessary to dispose of the case, even if it were decided on appeal that the Warsaw Convention did not govern. He found that defendant was not negligent (A27).

Plaintiff appealed, claiming for the first time during all the years the case had been pre-tried, tried and re-tried, that Berguido's ticket did not comply with Article 3 of the Convention. Since the pre-trial procedures precluded raising theories not presented to the trial court, plaintiff's counsel argued that *if the ticket violated Article 3, the Convention did not apply* and all he had to prove was negligence (*infra* pp. 13-17). The court affirmed the judgment below, holding that Judge Boldt's finding that plaintiff failed to prove negligence disposed of plaintiff's contention. There was therefore no need for the court to consider the "ticket" issue or other points which defendant argued would have required affirming the judgment.

On petition for rehearing plaintiff tried to make out a conflict between the decision and the Second Circuit's holding in *Lisi*. Seven judges (Biggs, McLaughlin, Hastie, Forman, Smith, Freedman and Seitz) decided against a rehearing; two (Kalodner and Staley) wanted one.

## ARGUMENT.

### 1. Certiorari Should Not Be Granted to Review Legal Questions Based on "Facts" Not in the Record.

Petitioners say that Carlos Berguido's ticket was "identical" to, or "less legible and less informative" (to whom, Berguido?) than John Lisi's[4] ticket (Petition, pp. 12, 14). On that contention *about the facts* hang four of the five questions petitioners present (Petition, p. 3), their prolix and unnecessary legal argument (Petition, pp. 9-34),[5] their motion to consolidate this case with the *Lisi* case, and their prayer for relief (Petition, p. 25).

The statements made by petitioner's counsel are not facts of record. They are imaginary. They came into this case for the first time at the appellate level after some ten years of litigation. They developed not from evidence, or from findings by a trial judge or a jury, not as an inference from a verdict or as a ruling by a court, but as unsupported statements in letters and briefs petitioner's counsel wrote to the judges of the Court of Appeals. The majority of the judges decided the case without having to study the record to see whether it supported the statements about the ticket (*infra* pp. 18-19), and the dissenting judge also did not "reach this contention" (Petition, p. 84). On petition for rehearing Judge Kalodner again dissented. This time he said that the Lisi ticket was "similar to that here involved" (Petition, p. 58). He must have accepted as true what plaintiff's counsel said about the Berguido ticket. He must have done so without examination of the record, for

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4. This is a reference to *Lisi, et al. v. Alitalia Aeree Italiane S. p. A.*, 370 F. 2d 508 (1966), *cert.* 2d Cir., Appellate Docket No. 70.

5. We assume that *Lisi* has been well briefed and that rehashing it is unnecessary. We take no position one way or the other about that case. The present case is not and never has been *Lisi*.

he could not have found either in the pleadings, or in the pre-trial memoranda, or in the many pre-trial conferences and rulings, or in the evidence introduced at three complete trials, a fair basis for the conclusion. Yet belief in its truth led him and Judge Staley to dissent from the decision of the other seven judges and to say that the majority's decision conflicted with the Second Circuit's *Lisi* decision (Petition, pp. 58-60). Therein lies a grave soft spot in our system of justice. Two judges decided against appellee because of their belief in the truth of mis-statements made by the appellant's lawyers.[6]

What does *the record* show about Berguido's ticket? First and foremost, the entire ticket is not in evidence. Copies of parts of it are (Petition, Appendix B), but the entire ticket (the jacket, the back, the terms and conditions, whatever there might have been besides the flight coupons) was not introduced by anyone at any of the five trials, and does not appear in any of the pre-trial procedures (even

6. We are not arguing morals. A party can be hurt just as badly by inadvertence or over-zealous advocacy as he can be hurt by intentional deception. Suppose, for instance, that it were important to a justice of this Court, in considering the instant petition, to know what Judge Hastie thought about this case. Suppose that the justice accepted as true petitioner's mis-statement on page 2 of the petition that Judge Hastie dissented (he did not, he signed the opinion for himself and the other six judges denying the petition for rehearing). Respondent could be hurt. And it would not matter whether the statement "Hastie dissented" was an inadvertent slip (which it appears to be) or a planned deception (which it might have been). In either case Respondent would be hurt just as much.

Suppose it were important to a justice to know whether petitioner was attempting to get relief on a ground never raised at the trial level, or whether he was arguing a point inconsistent with his position in the Court of Appeals, and suppose that the justice read on page 9 of the petition:

> "The appellant's position has consistently been that she wins on proof of failure by the carrier to comply with Article 3(1) and that she need prove neither negligence nor wilful misconduct."

If the justice accepted that statement at face value, respondent would be hurt. The statement quoted above, and we cannot and do not equivocate here, is absolutely false (see pages 13-19, *infra*).

Judge Kalodner, the dissenter, agrees—Petition, p. 84, fn. 1). The ticket was paid for and obtained by Berguido on December 2, 1955, three days before his initial flight, and it provided round-trip air transportation from Philadelphia to San Salvador and return (Complaint, ¶ 3, 18a; for date of initial flight, December 5, 1955, see flight coupons, Appendix B to Petition).[7] Apart from what appears in the Complaint and in the copies of the face of the flight coupons there is *no* evidence—either documentary or otherwise—describing the ticket, its size, its color, what was written on it, etc. There was, however, a pre-trial agreement in 1961 that

> "The tickets issued to plaintiff's decedent complied with the provision of Article 3 relating to documents."

This is a quotation from Defendant's Trial Memorandum (Record Document 85). Plaintiff's memorandum in reply (Record Document 84) agreed:

> "The plaintiff has very little opposition to defendant's statement of the case. The plaintiff disagrees with the legal result . . ." followed by the argument that the Warsaw Convention was inapplicable to Berguido's flight from Miami to Philadelphia (9b-12b).

Judge Boldt had this agreement before him at the pre-trial conference prior to the last trial (71a-72a). He specifically asked plaintiff's counsel about it and they represented to the judge without reservation that their position about the Convention was set forth in that memorandum (117a).

At no time during any of the trials, pre-trials, or post-trial procedures in the district court did plaintiff's counsel

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7. References followed by the letter *a*, i.e., 18a, are page references in Appellant's Appendix, Appeal No. 15156, Court of Appeals for the Third Circuit. References followed by *b*, are to Appellee's Appendix in the same appeal.

repudiate their agreement or suggest that there was an issue between the parties about delivery of the tickets to Berguido or his understanding of their import. Therefore, these matters were never actively litigated and necessarily there is no specific fact finding about them.[8]

Is it "scandalous" to represent to this court as "facts" matters which were never established in the trial court or which were resolved there contrary to what this court is told? If it is, then the petition should be "disregarded and stricken by the court" (Supreme Court Rule 40), for the petition contains many such "scandalous" statements. For instance:

> The defendant airline failed "to print in adequately informative, clear, proper legible form" certain information on Berguido's ticket—Question Presented No. 1 (Petition, p. 3).
>
> * * *
>
> ". . . the carrier has failed to comply with Chapter II, Article 3(1) of the Convention as to the form and contents of the ticket or proper delivery of the same". Question Presented No. 2 (Petition, p. 3).
>
> * * *
>
> ". . . the ticket in the instant case" had "miniscule illegible print" and failed to state a "monetary limitation". Jacksonville was an "agreed stopping place." Question Presented No. 3 (Petition, p. 3).

See also p. 14 where petitioners say plaintiff's decedent had *not* agreed to land in Jacksonville, also a statement with no evidence to support it.

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8. This is not to say that there was no finding at all. When parties agree about an issue it is "found" in the sense that it becomes a fact. No proof is necessary. In this sense tickets meeting all requirements of Article 3 were "found" as a part of each of the trials. And that fact was "found" no matter where the burden of proof would have been if the parties had disputed the fact.

* * *

> Petitioner "established a faulty ticket"—A black-letter heading on page 10!

It would be most interesting to know where in the record petitioners took the procedural step to "establish" this crucial fact. What fact-finder, judge or jury, made any such finding? It would, perhaps, have been helpful to the court if petitioners had included the record reference where the "evidence offered" may be found and where the finding about that evidence was made. See Rule 40, 1(e) and 2; Stern and Gressman, *Supreme Court Practice* (2nd Ed. 1954), p. 198.

* * *

> ". . . the carrier delivered a . . . ticket much less legible and less informative than the *Lisi* ticket." (Petition, p. 12)

* * *

> ". . . the form, context, size of print and the obscurity and difficulty in reading the *Lisi* and the instant Berguido ticket are identical" with one exception (Petition, p. 14).

* * *

And so it goes, factual statement after factual statement, all of them unsupported by the record and most of them directly contrary to counsel's pre-trial agreement.

In *Lisi* the district court judge presumably examined the entire ticket. At least he had before him "all evidentiary facts" material to the issue of compliance with Article 3, and the parties did not dispute that the facts were complete (253 F. Supp. at 138). The parties had joined issue on the question and had submitted affidavits. The pertinent writing on the ticket was on the "outside front cover", on the "coupons", and "on page 4." Part was "virtually invisible . . . ineffectively positioned,

diminutively sized, and unemphasized by bold face type, contrasting color, or anything else" (253 F. Supp. at 243). These, of course, are basically factual matters depending "in each case on the particular factual circumstances . . . to be applied by the jury on the evidence before it." *Mertens v. Flying Tiger Line, Inc.*, 341 F. 2d 851, 857 (2d Cir. 1965), *cert. denied*, 382 U. S. 816. However, the district judge in *Lisi* thought a jury could not reasonably find differently than he did (253 F. Supp. at 239). A majority of the Court of Appeals agreed with him. The dissenting judge thought that even in this extreme case the court had usurped the jury's function (370 F. 2d at 515).

No matter who is right and who is wrong in *Lisi*, the case has nothing to do with our case. Here the parties did not join issue; they agreed instead that there was no issue. Here neither judge nor jury examined any part of the tickets other than the coupons, and they examined those simply to determine whether the flight was international. What was on the outside front cover, or on page 4, or on any other page, or on the back, was not before any fact-finder and is nowhere in evidence. What was said on any such parts of the ticket, let alone how it was said, i.e., its size, contrasting color, style of type, etc., is not, and never has been, a part of this case. What a fact-finder, judge or jury, would have said about the evidence had it been introduced, is conjectural.[9] One thing is of passing

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9. To have won on this issue plaintiff would have had to convince a jury (defendant did not waive jury trial on this issue) that Berguido's ticket was not delivered in time to give him reasonable notice of the Warsaw Convention so that he could take protective measures such as purchasing flight insurance. *Mertens v. Flying Tiger Line, Inc.*, 341 F. 2d 851 (2d Cir. 1965), *cert. denied*, 382 U. S. 816. Berguido got his ticket three days before his initial flight and eighteen days before the fatal flight (Complaint, ¶ 3, *supra* p. 9). He was a member of the Philadelphia Bar, specializing in international law, and he served on American Bar Association committees on international law (Trial Transcript, January 27, 1964, pp. 548-9, Record Document No. 184). He was counsel for the consulates of seventeen

interest. The type on the copies of the Berguido coupons is larger, more noticeable and easier to read (in spite of the obviously poor duplication) than its counterpart in *Lisi* (Compare Appendix B to Petition with the coupon replica at 253 F. Supp. 242). But these are factual matters, wholly inappropriate for this court to consider.

Since petitioner's Questions Presented Nos. 1, 2, 3 and 5 all depend upon facts not of record, and since petitioner's statement of the case does not contain "the facts material to consideration" of those questions [Rule 23(e)], or the record reference where the "evidence offered" may be found [Rule 40, 1(e) and 2], the petition should not be given consideration. To put this another way, petitioner's attempt to squeeze this case into the *Lisi* mold is an example of extreme advocacy. It is inappropriate for this court to be burdened with that sort of thing.

**2. The Decision Below Does Not Conflict With Lisi or Any Other Case.**

The Court of Appeals simply affirmed the judgment of $8,300 against the defendant, thereby confirming the correctness of verdicts reached independently by a jury and by a judge sitting non-jury. Contrary to what is said in the petition before this court (Pages 9, 10, 11, 12, 22, 26-7) Judge Forman and Chief Judge Biggs did not "hold" that if a plaintiff in a Warsaw Convention case proves noncompliance with Article 3, he must then prove negligence.

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Central and South American countries (same transcript, p. 552), and he represented South American shippers (*idem* p. 556). In the last two years of his life he flew to South America about thirty times (*idem* p. 553). Before his ill-fated trip he purchased flight insurance (conceded by plaintiff's counsel at hearing prior to 1964 trial—Transcript of hearing before Chief Judge Clary, November 26, 1963, p. 7, Record Document No. 144). We doubt that even the forensic talents of Mr. Richter could have convinced a jury to return a verdict his way on those facts. The very contention that Berguido could not take protective measures is the sort of legal extremism which creates community disrsepect for the law and lawyers.

They (and five other judges on petition for rehearing) decided simply that Mr. Richter lost even if his own rather devious argument about the law were to be applied. If that is not clear to this court from Judge Forman's opinion alone, it should be plain in light of the case's history, the rules governing appeals in the Third Circuit, and the argument Mr. Richter presented there.

The Third Circuit applies the rule that issues not presented to the trial court will not be entertained on appeal. *In re Linda Coal and Supply Co.*, 255 F. 2d 653, 657 (3rd Cir. 1958); *Quinones v. Township of Upper Moreland*, 293 F. 2d 237, 240 (3rd Cir. 1961); *Cochran v. B. & O. Railroad Company*, 340 F. 2d 709, 710 (3rd Cir. 1965). The court also has a rule that it will not consider on appeal an issue not included in a party's "Statement of the Questions Involved". Rule 24(2)(b).[10] Finally, there is a well established pre-trial procedure in the Eastern District of Pennsylvania. The Court of Appeals, like the District Court, holds parties to the issues they have preserved at pre-trial. *Payne v. S. S. Nabob, et al.*, 302 F. 2d 803 (3rd Cir. 1962), *cert. denied*, 371 U. S. 870; *Kline v. S. M. Flickinger Co.*, 314 F. 2d 464 (3rd Cir. 1963); *Wiggins v. City of Philadelphia*, 331 F. 2d 521, 526 (3rd Cir. 1964); Fed. R. Civ. Proc. No. 16.

In this case the trial judge, George H. Boldt, held an extended pre-trial. He ordered, with the agreement of the parties, that the issues Judge Clary gave the 1961 jury were the issues to be tried, unless counsel specifically raised others (56a). Judge Clary had ruled that the Warsaw Convention governed the flight in question and that the sole questions for the jury (he submitted a special verdict) were (1) was there wilful misconduct, and (2) what were

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10. "The . . . requirements are to be considered in the highest degree mandatory, admitting of no exception; ordinarily no point will be considered which is not set forth in or necessarily suggested by the statement of questions involved." 28 U. S. C. A. Rules, U. S. Courts of Appeals, p. 212.

plaintiff's total damages? (Record Document No. 116). At the pre-trial before Judge Boldt plaintiffs' counsel preserved one and only one further point, that the Warsaw Convention was inapplicable, as per their trial memorandum filed May 22, 1961 (117a). So the parties went to trial limited to the issues (1) did the Warsaw Convention apply, (2) if it did, was there wilful misconduct, and (3) if it did not, was there negligence?

Defendant proved that the flight was international, and the trial judge ruled that the Convention applied (A24). He also found neither wilful misconduct nor negligence (A27). Plaintiff appealed.

While the appeal was pending the Second Circuit decided *Mertens v. Flying Tiger Line, Inc.*, 341 F. 2d 851 (1965), *cert. denied*, 382 U. S. 816, and plaintiff's counsel in the instant case looked for a way to open the "issue" door. They could not argue that the holding in *Mertens* was applicable here, for they had not introduced evidence on the theory that Berguido had no chance, after delivery of a ticket, to take protective measures,[11] and they had not preserved the point at pre-trial. Under well-settled law that approach was unavailable to them. So they devised the unexpected, if not dishonest, argument that the pre-trial reservation meant that the Warsaw Convention *did not apply* if the air line failed to prove delivery of the ticket.[12] Judge Forman summarized the argument, perhaps with scepticism,[13] as follows (Petition, pp. 65-66):

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11. See footnote 8, *supra* p. 10. We doubt that plaintiff's trial lawyers would ever have put in issue, especially before a jury, Berguido's knowledge of the Convention limitation. Counsel could hardly want to open the door to proof that Berguido purchased flight insurance.

12. The fact that there was clear record evidence that the ticket was delivered did not keep appellant's counsel from making the argument.

13. See especially the judge's note that the District Court did not understand plaintiff's position to be what plaintiff's counsel told the Court of Appeals it was (Petition, p. 69, fn. 11).

> "Plaintiff alleges that it also urged that defendant had not met its obligations under Article 3(1) of the Convention and, thus, the Convention did not apply. Plaintiff appears to indicate that the District Court was thus urged in the alternative to try the case on the theory of simple negligence."

Plaintiff's complete STATEMENT OF QUESTIONS INVOLVED in the Court of Appeals was:

> "Did the lower court err when it:
>
> 1. ruled that the Warsaw Convention applied to this case?
>
> 2. found that jets were the probable cause of this accident and consequently ruled that the plaintiff did not sustain the burden of proving that the accident was caused by wilful misconduct?

Then, limited as they were by the pre-trial issues, and limited by the rules of the Court of Appeals to arguing the foregoing questions, appellant's counsel argued in their brief (p. 11):

> "The judge ruled as a matter of law that the Warsaw Convention applied (1252a) . . . The defendant never proved any delivery of this ticket to plaintiff's decedent and did not prove any affirmative consent to this statement on the ticket by the decedent. We shall show below that as a matter of law what the defendant proved was not sufficient to sustain its burden of proving that this case was governed by the Warsaw Convention. *Since the case was not governed by the Warsaw Convention, plaintiff merely had to prove negligence* and since such negligence was clearly proved, this Court should reverse and award damages as found by the trial judge . . ." (Emphasis supplied.)

On page 19 of the same brief again they argued:

> ". . . the Warsaw Convention clearly should not apply to the present case.[14]
>
> "If the Warsaw Convention does not apply to this case, there would be unlimited liability on the defendant for simple negligence."

After filing the foregoing brief plaintiff's counsel were given leave to file a supplemental brief in which "for the first time", as Judge Forman put it (Petition, p. 69),[15] they advanced the notion that the Warsaw Convention not only provides for liability (which, subject to an exception in the Convention itself, defendant does not dispute) but for *unlimited* liability (which is quite a different thing and which defendant does dispute).[16] Under counsel's unique "unlimited liability" view of the Convention a plaintiff has no burden to prove anything. A defendant, they said, must prove compliance with Article 3, and absent proof of

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14. This is part of a quote which is repeated verbatim in the Petition, p. 30, with an interesting variation. Now instead of the words "the Warsaw Convention should not apply" are the words "the limitations of Article 25 [sic] of the Warsaw Convention clearly should not be permitted to attach". Apparently petitioner no longer feels limited by the pre-trial order or the court rules which precluded that argument below.

15. It is not clear whether Judge Forman meant for the first time in history or for the first time in this case.

16. Much of the Petition is devoted to counsel's "unlimited liability" theory, which is simply an exercise in poor semantics. They take about twenty-seven pages to disguise their major premise that the Convention's words "shall be liable" (Article 17) mean "shall pay unlimited damages." The reasoning has a Lewis Carroll flavor: (1) the Convention creates liability, (2) "absolute" is a handy word to use along with liability, (3) "absolute" is the same as "unlimited", *ergo* (4) the Convention provides for absolute, unlimited liability. The Court of Appeals did not accept the syllogism, and could not, since the Convention provides expressly that liability (Article 17) "shall be limited" (Article 22) and that suit may be brought "only . . . subject to the . . . limits set out in this convention" (Article 24). Petitioner did not print Article 24.

such compliance the unlimited damage part of the Convention applies.[17]

Judge Forman's opinion disposed of the case on the *arguments* appellant's counsel presented. Notice how carefully the judge casts the issues in terms of appellant's "argument" (Petition, pp. 70-71). First he gives short shrift to the attempt to avoid ten years of litigation by resort to the absolute and *unlimited* "argument". His decision in this respect is consistent, as he points out it is, with earlier Warsaw Convention cases (Petition, pp. 70-71), and we would add that it is consistent with the most recent Warsaw case, *Lisi.* "Having disposed of this contention" (Petition, p. 71), i.e., the contention in appellant's supplemental brief, the judge resolves the only remaining "question involved" about the Convention, i.e., question No. 1 in the original brief (*supra* p. 16). He concludes that on the evidence the court must sustain Judge Boldt's finding of no negligence. Consequently the appellants lost, for even if their "argument" about non-applicability of the convention had entitled them to proceed to trial on a negligence theory, they had failed at trial to sustain their burden (Petition, pp. 71-74). Having reached this conclusion it was *unnecessary* for the court to resolve differences between the parties about the meaning of the pre-trial order, the extent or lack of proof about Berguido's ticket, where the burden of proof lies under the Convention, or the significance of the earlier reversal of the jury verdict for $8,300 (Petition, p. 70).

This case was decided—and in view of Mr. Richter's switch of theory after years of litigating other issues—

17. Where counsel find a provision for unlimited damages either in the language or history of the Convention, or in any of the cases they cite (Petition, pp. 11, 12, 21, 24-5, 26-7), is a mystery. If they are right, all the courts which for all these years have required proof of wilful misconduct as an *exception* to the Convention's scheme of *limited* liability have been wrong. The "no ticket" *exception* to limited liability set out in Article 3(2), sentence 2 (Petition, p. 4) is phrased exactly as is the "wilful misconduct" *exception* in Article 25(1) (Petition, p 7).

justly decided on narrow grounds. There is no case remotely like it. Therefore it conflicts with no case. More specifically the case was resolved on grounds entirely foreign to the *Lisi* litigation. Seven judges, all of whom were supplied the full text of the *Lisi* opinion well before they decided the petition for rehearing, saw no conflict between Judge Forman's opinion and the Second Circuit's opinion in *Lisi*. Surely a rehearing would have been held if they had decided that their holding conflicted with the Second Circuit's.

**3. This Court Should Not Grant Certiorari to Find Facts.**

Pages 34 through 49 of the petition are devoted to an argumentative re-hash, in the light most favorable to the plaintiff, of the record of some of the evidence in the most recent trial (eight trial days, 59 exhibits). Petitioner argues that the trial judge was wrong when he found that all the evidence did not add up the way petitioner wishes it did. Presumably Chief Judge Biggs and Judge Forman were, in petitioner's view, also wrong when they decided that the trial judge justifiably (defendant would argue "necessarily") found as he did. Respondent most emphatically disagrees with petitioner's analysis of the evidence. But seeing nothing in this court's Rule 19 to indicate that the court would grant certiorari to resolve differences over the correctness of a trial judge's findings of fact, we resist the temptation to re-argue the evidence here.[18]

**4. To Grant Review Would Be Futile.**

Review of the decision of the Court of Appeals will do petitioner no good in the long run. There are multiple,

18. Defendant's argument to the trial judge is in the Appendix, 1163a-1211a. The trial judge found that plaintiff's key witnesses were neither expert nor truthful (A28-29). These are the men whose qualifications and opinions petitioner asks this court to accept, calling them, contrary to the record below, "three highly qualified aeronautical experts" (Petition, pp. 35, 39, 48).

as yet undecided grounds on any one of which the judgment of $8,300 would have to be affirmed (Petition, p. 70). Not the least of these stems from a jury verdict for $8,300 in 1964. The trial judge set it aside on grounds which twice in recent years this court has held to be insufficient to justify reversal. Chief Judge Clary's opinion is printed in Appellee's Appendix, 44b-64b. Add to what the judge says about admitting evidence "over plaintiff's objections" (45b) the fact that the ground for the objection was not the ground for the reversal, and add the fact—for it is a fact—that no proper record was made during the course of the three week's trial to preserve for review the other "objectionable" matters the judge discusses at such length, and compare the end result with this court's holdings in *Gibson v. Lockheed Aircraft Service, Inc.*, 350 U. S. 356 (1956) and *Mercer v. Theriot*, 377 U. S. 152 (1964). Furthermore, the grant of the new trial violated Amendment 7 of the Constitution since the judge "reexamined" the jury's decision otherwise "than according to the rules of the common law."

It would unduly prolong this brief to argue in detail any of the many points which, if certiorari were granted, would in the last analysis require affirmance of the judgment. We merely list them to preserve our right to press any or all should it become necessary.

1. Plaintiff had a fair trial in 1964. The jury's verdict was therefore final.

2. Plaintiff's pre-trial agreement that the Berguido ticket complied with Article 3 of the Convention precludes an argument to the contrary on appeal.

3. The District Court for the Eastern District of Pennsylvania limits issues at trial to those stated in parties' pre-trial memoranda. Plaintiff did not include the "ticket issue" in his memorandum or in any amend-

ment. It is, therefore, before no court, trial or appellate.

4. The pre-trial order, which with agreement of the parties, narrowed the issues to (a) wilful misconduct and (b) applicability of the Convention to Berguido's flight, precludes expanding the issues on appeal, since Rule 16, Fed. R. Civ. Proc. provides that ". . . such order . . . controls the subsequent course of the action . . ."

5. Plaintiff's failure to raise the "ticket issue" in the trial court precludes arguing it on appeal.

6. Since defendant waived jury trial after, and only after, the issues were narrowed to exclude the "ticket issue," consideration of that issue at the appellate level would be a deprivation of defendant's Constitutional right to trial by jury.

7. Under federal procedure, contrary to the decision of the Court of Appeals, parties may, after issues are narrowed at a pre-trial conference, agree to waive findings of fact and conclusions of law and to accept a general finding in the nature of a verdict. Accordingly, Judge Boldt's general finding that the Convention applied included the sub-finding that the ticket complied with Article 3.

8. Plaintiff failed to sustain the burden of establishing, in order to remove the liability limitation of the Warsaw Convention, that Berguido's ticket was not delivered in accordance with Article 3.

9. Extension of the *Mertens* (*supra* p. 12, fn. 9) and *Lisi* (*supra* pp. 11-12) cases to impose on carriers other than the issuing carrier liability for "irregularity of the passenger ticket" would be contrary to the explicit provisions of the Convention (Article 3, Petition, p. 4).

## CONCLUSION.

Much time and effort has been devoted to this case by everyone involved, parties, witnesses, lawyers and judges. Two things have emerged quite clearly: (1) on all the evidence misconduct of Eastern's crew is not the explanation of this unfortunate crash, and (2) where trial procedures conform to the rule of law, our system of trial —with or without a jury—is quite capable of distinguishing between fact and fantasy. Twice now the fact finder has decided there was no wilful misconduct. Twice now, limited only by what is legally permissible, plaintiffs have received every opportunity to prove their case as fully as they saw fit. The Court of Appeals saw that clearly. They decided the appeal on meticulously correct and just grounds, fully within the exercise of their own discretion in the supervision of their own bench and bar. The decision is of local concern only, and there is no reason for this court to review it. The petition for certiorari should be denied.

Respectfully submitted,

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## APPENDIX A.

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## OPINION OF THE TRIAL JUDGE, GEORGE H. BOLDT.

The Court: Good afternoon, gentlemen.

We are convened now for pronouncement of judgment.

In the hours of decision every judge worthy of the name and position is alone with his conscience and aided only by such character qualifications and abilities as God has given him. In every difficult case involving serious issues decision is a strenuous and exhausting process.

Evidence as to important facts in controversy often is not available or not presented to the Court. Of course, only the evidence presented to the Court must be the sole basis of decision. The search for truth on meager and incomplete evidence is a most difficult task. So it has been in the present instance.

By stipulation the making and entry of findings of fact and conclusions of law pursuant to Civil Rule 52 has been waived, and counsel have agreed expressly that the Court's decision may be limited to general findings, either for or against liability, and in a single total sum fixing damages, including all elements for which damages may be allowed. The case will now be determined on that basis.

However, before making such general findings, it appears appropriate and desirable to state certain basic holdings as to the applicable law and to make several particular findings of fact.

The evidence presents a large number and variety of what might be called incidental, preliminary or secondary fact issues. Discussion of any considerable number of them would require very lengthy statement and serve no useful purpose. Suffice it to say that the evidence relating to every

fact issue has been painstakingly examined for credibility, weight and significance. The determination so made in my humble judgment fully supports the particular and general findings of the Court.

Various comments and statements made by me during the trial and particularly during the final argument of counsel have already indicated my reasoning and views on a number of fact and law questions.

I have not seen or reviewed a transcript of the argument. Indeed, I am not sure there is one. But I hereby reaffirm the observations and findings stated therein.

It should be stated for the record that every exhibit has been examined closely. Every deposition and transcript of prior testimony in the present record has been carefully read. Many portions of the daily transcript of this trial have been painstakingly reviewed, and the argument of counsel has been heard with close attention and full consideration in the process of reaching decision.

In my deliberations no part of the proof offered by plaintiff has been treated as inadmissible evidence. Before reaching final findings and conclusions as to liability, all evidence offered by plaintiff, whether or not objected to, has been weighed and considered for probative value. Also, those portions of the defendant's evidence to which plaintiff objected have been carefully screened. No portion thereof found incredible or even doubtful as to admissibility has directly or indirectly entered into the Court's ultimate decision.

Defendant's Request for Admission of Facts, Defendant's Exhibit 12, quoted at Pages 904-6 of the transcript of this trial were not answered by plaintiff, and therefore the stated therein must be accepted as uncontroverted. Those facts fall squarely within the term "international flight" as defined in the Warsaw Convention, 49 United States Statutes, Page 3,000. Accordingly, that international treaty is controlling in this action.

It is not for this Court to question the policy or wisdom of the treaty or to evade or avoid the plain meaning of its language.

Under the treaty defendant's liability is limited to the amount defendant has tendered to the plaintiff in the present case, namely, $8300, unless the accident was caused in whole or in part by willful misconduct of defendant or any of its employees or agents. Thus, whether or not defendant is chargeable with any act or omission constituting final misconduct is the basic and ultimate issue for decision as to liability.

Plaintiff cites KLM v. Tuller, 292 F. 2d 775, an action based on the Warsaw Convention, and relies on the definition of wilful misconduct stated therein as follows:

> "'. . . the intentional performance of an act with knowledge that the * * * act will probably result in injury or damage, or * * * in some manner as to imply reckless disregard of the consequences of its performance; and likewise, it also means * * * failure to act' in such circumstances."

This definition is substantially identical with that given to the jury in the two previous jury trials of this case.

As so defined, plaintiff has the burden of proof to show by a preponderance of evidence, willful misconduct chargeable to defendant.

In considering whether that burden has been sustained, this Court has meticulously followed the principles stated in the following quotations from Smith v. Bell Telephone, 397 Pa. 134, and Lear v. Shirk's Motor Express Corporation, 397 Pa. 144:

> "The formula that the 'circumstances must be so strong as to preclude the possibility of injury in any other way and provide as the only reasonable inference the conclusion plaintiff advances' is not a correct statement of the rule to be applied. . . .

"Therefore, when a party who has the burden of proof relies upon circumstantial evidence and inferences reasonably deducted therefrom, such evidence, in order to prevail, must be adequate to establish the conclusion sought and must so preponderate in favor of that conclusion as to outweigh in the mind of the fact-finder any other evidence and reasonable inferences therefrom which are inconsistent therewith."

And from the Lear case:

"It is enough that he" (plaintiff) "produces evidence which may properly be found by the jury to justify an inference that the defendant's negligence was the proximate cause of the accident because such evidence outweighs even though it does not exclude an inference that the defendant was not negligent or that his negligence was not the proximate cause of the accident."

The only evidence upon which plaintiff bases its contention of willful misconduct on the part of the defendant pertains to, first, certain health conditions of the pilot and co-pilot of Eastern Air Lines flight 642, and, second, knowing and intentional violation by the flight crew of regulation prescribed for an ILS approach to the Jacksonville airport, particularly with respect of mandatory minimum elevation. Every minute item in the record purporting to bear directly or indirectly upon the cause of the crash has been examined and reexamined in considering the direct evidence and the reasonable inferences to be drawn therefrom.

A considerable number and variety of causes of the accident under the evidence are within the realm of possibility, as distinguished from probability. As stated in the Smith and Lear decisions just quoted, the judgment of the Court must be determined upon the probabilities insofar as they are disclosed or can be determined from the

evidence, and not on mere possibilities whether or not mentioned in the evidence.

Viewed strictly in this light, I have reached the following firm findings and conclusions:

1. I find there is not a preponderance of credible evidence that a health condition of either pilot or misrepresentation, if any, relating thereto, constituted willful misconduct causing or contributing to the crash of Flight 642.

2. It is my opinion, and I now so find, there is not a preponderance of credible evidence showing a substantial or reasonable probability that the Flight 642 crew, or any of them, under other than emergency conditions knowingly and intentionally brought the plane to a position below the minimums prescribed for an ILS approach, or knowingly and intentionally violated any other regulation for or requirement of a proper ILS approach.

3. In my opinion there is substantial and reasonable probability shown by a preponderance of the evidence that the presence of jet aircraft in or near the ILS glide slope for Runway 5 and in or near the immediate pathway of the landing approach of Flight 642 threatened or interfered with the approach of Flight 642, bringing about emergency conditions and accident resulting in the crash without willful misconduct, negligence or fault on the part of defendant or any member of the crew of Flight 642.

4. The actual cause of the crash of Flight 642 cannot be determined on the record before me, and I find willful misconduct as a cause of the accident to be no more than one possibility, among others.

In any event, willful misconduct, in my judgment, is far less probable as a cause of the crash than the highly probable presence and actions of jet aircraft in or near the ILS approach path of Flight 642.

As just stated, I believe there is substantial probability that one or more jet aircraft were in or near the immediate vicinity of the ILS glide slope leading to Runway 5 during the landing approach of Flight 642 within a very short period of time prior to the plane crash. Three witnesses emphatically testified to that effect: Wheeler, Lubin and Farrish. To me their testimony has the ring of truth, and I find no reason to doubt their credibility on the essential fact as to the presence of jet aircraft as stated in their testimony.

To me, affirmative testimony as to seeing objects and hearing sounds, when unequivocal, reasonable and ringing true to the trier of fact is far more persuasive and convincing than testimony that said sights or sounds were not seen or heard by other witnesses having opportunity and occasion to see and hear.

On this subject, the negative testimony in this case, whether taken singly or as a whole, in my mind does not balance or outweigh the affirmative testimony. The testimony of Greenslade and others to the effect that no military jets were reported or recorded as operating in the Jacksonville area at the time, while given full consideration, does not convince me that jet aircraft were not or could not have seen and heard at the time and place indicated in the testimony of Wheeler, Lubin and Farrish.

Inasmuch as plaintiffs' contentions as to liability rest heavily upon the testimony of witnesses offered as experts, particularly Glickstein, Kapner and Cann, I should briefly state my findings and observations concerning those witnesses, as well as my appraisal of the credibility of Watson and Schmidt offered by defendant as experts in some or all of the areas of Inquiry covered by Glickstein, Kepner and Cann.

Plaintiffs' basic contention that the pilot of Flight 642 attempted a so-called take-a-look or sneak-in approach by knowingly and intentionally piloting their plane to a posi-

tion below the authorized ILS approach minimum elevation was devised by Mr. Glickstein, according to his testimony. At a time not clearly identified in the record but considerably after the accident and after the initial proceedings in this action, Glickstein actively participated in the case as an attorney in the taking of depositions, at least two of which, those of Farrish and Lubin, are now in evidence.

From these circumstances, and many others in the record, it is clear to me that Mr. Glickstein to a considerable extent has been a partisan in this litigation. His appearance, demeanor and manner of testifying on the stand, as well as the content of his testimony, in my judgment, shows him lacking the distinterest and objectivity which reasonably ought to characterize a reliable and credible expert. I make generous allowance for the fact that many, if not most, experts tend to be more or less partisan. In my opinion, Mr. Glickstein substantially exceeds the allowable limits in this particular. He readily expresses unqualified opinions which in my view are highly speculative and conjectural. While long and well qualified as an airplane pilot, Mr. Glickstein has little, if any, expertise in the investigation of airplane accidents or in the scientific analysis of the cause of airplane crashes. In important particulars the assumed facts on which his opinions purportedly were based do not lead me to the conclusions he derives therefrom.

Incidentally, I do not find as proven by a preponderance of the evidence all of the assumed facts stated in the hypothetical questions put to Kepner, Glickstein and Cann. But even if all assumed facts be taken as proven, I do not agree with the opinions derived therefrom by these witnesses. The end result just stated is applicable to Kepner, the long-time friend of Glickstein, and Cann. From my observation of these gentlemen on the stand and in an analysis of their testimony I find their opinions incredible,

to me, and unacceptable in various important and decisive particulars.

During the argument my appraisal of the credibility of Watson and the acceptability of his testimony was stated.

I now state my finding that Schmidt is a highly credible witness, and I find no reason to doubt the validity of the opinions that he has expressed. His impressive professional background and experience in airplane accident investigation and analysis of the cause of airplane accidents is unchallenged. It appeared to me that Mr. Schmidt was meticulously accurate and truthful in his testimony.

For the reasons stated, and many others of greater or lesser importance in the reaching of my final decision, I now make the ultimate general finding on liability as follows:

Plaintiff is entitled to recover against defendant only as limited by the Warsaw Convention in the amount of $8,300, the sum previously tendered to plaintiff by defendant. The Clerk is directed to enter judgment to that effect forthwith, with recovery of costs by defendant.

I now make the additional general finding that plaintiff sustained damage by reason of the death of her husband, Carlos Berguido, on account of all the allowable elements of recovery, in the total sum of $375,000, for which, of course, recovery is not allowed.

This is the judgment of the Court, and it is so ordered.

We will recess, subject to call.

## APPENDIX B.

## PERTINENT PROVISIONS OF THE WARSAW CONVENTION NOT PRINTED BY PETITIONER.

### CHAPTER I. SCOPE—DEFINITIONS.

ARTICLE 1.

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its

international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.

* * *

## CHAPTER II. TRANSPORTATION DOCUMENTS.

* * *

### SECTION III.—AIR WAYBILL.

#### ARTICLE 5.

(1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air waybill"; every consignor has the right to require the carrier to accept this document.

(2) The absence, irregularity, or loss of this document shall not affect the existence or the validity of the contract of transportation which shall, subject to the provisions of article 9, be none the less governed by the rules of this convention.

* * *

#### ARTICLE 8.

The air waybill shall contain the following particulars:

(*a*) The place and date of its execution;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the consignor;

(*e*) The name and address of the first carrier;

(*f*) The name and address of the consignee, if the case so requires;

(*g*) The nature of the goods;

(*h*) The number of packages, the method of packing, and the particular marks or numbers upon them;

(*i*) The weight, the quantity, the volume, or dimensions of the goods;

(j) The apparent condition of the goods and of the packing;

(*k*) The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

(*l*) If the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;

(*m*) The amount of the value declared in accordance with article 22(2);

(*n*) The number of parts of the air waybill;

(*o*) The documents handed to the carrier to accompany the air waybill;

(*p*) The time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon;

(*q*) A statement that the transportation is subject to the rules relating to liability established by this convention.

ARTICLE 9.

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8 (*a*) to (*i*), inclusive, and (*q*), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

ARTICLE 10.

(1) The consignor shall be responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air waybill.

(2) The consignor shall be liable for all damages suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements.

* * *

## CHAPTER III. LIABILITY OF THE CARRIER.

* * *

ARTICLE 24.

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

* * *

ARTICLE 26.

(1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of transportation.

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from

the date on which the baggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

* * *

ARTICLE 28.

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

(2) Questions of procedure shall be governed by the law of the court to which the case is submitted.

ARTICLE 29.

(1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

ARTICLE 30.

(1) In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of article 1, each carrier who accepts passengers, baggage or goods shall be

subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of transportation insofar as the contract deals with that part of the transportation which is performed under his supervision.

(2) In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee.

* * *

## CHAPTER V. GENERAL AND FINAL PROVISIONS.

### ARTICLE 32.

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the transportation of goods arbitration clauses shall be allowed, subject to this convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of article 28.

ARTICLE 33.

Nothing contained in this convention shall prevent the carrier either from refusing to enter into any contract of transportation or from making regulations which do not conflict with the provisions of this convention.

* * *

ARTICLE 36.

This convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry for Foreign Affairs of Poland and of which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties.

* * *

ARTICLE 38.

(1) This convention shall, after it has come into force, remain open for adherence by any state.

(2) The adherence shall be effected by a notification addressed to the Government of the Republic of Poland, which shall inform the Government of each of the High Contracting Parties thereof.

(3) The adherence shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.

ARTICLE 39.

(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

* * *

ARTICLE 41.

Any High Contracting Party shall be entitled not earlier than two years after the coming into force of this convention to call for the assembling of a new international conference in order to consider any improvements which may be made in this convention. To this end it will communicate with the Government of the French Republic which will take the necessary measures to make preparations for such conference.

* * *

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IN THE

# Supreme Court of the United States

October Term, 1967.

## No. 528.

MARION J. BERGUIDO, Individually, MARION J. BERGUIDO, ROBERT G. ROWE and WARREN H. WOODRING, Executors of the Estate of CARLOS BERGUIDO, JR., and JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO and CARLOS BERGUIDO, 3rd, by Their Guardian, MARION J. BERGUIDO,

*Petitioners,*

*v.*

EASTERN AIRLINES, INCORPORATED,

*Respondent.*

## PETITIONERS' REPLY BRIEF TO RESPONDENT'S ANSWER.

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## PETITIONER'S REPLY BRIEF TO RESPONDENT'S ANSWER.

The whole tone and tenor of respondent's brief in opposition to the Petition for the Writ of Certiorari is directed to the proposition that plaintiff's counsel did not raise the question of the inadequacy of the ticket and its implications in the courts below. Petitioner throughout was troubled as to whether the Warsaw Convention applied and if it did, what its effect was. But definitely and explicitly she at the trial articulately or otherwise reserved her rights thereunder (117a). All that the petitioner did admit at the trial was that her challenge on the basis of the tax laws to implications of the Warsaw Convention was without merit. Now we are being criticized for our candidness.

However, whatever stance was assumed in the lower court just does not matter. The law is quite clear, both in the 3rd Circuit and in This Court. Where a case has been tried on law which is inappropriate to the case, the Courts of Appeals and this Court will reverse in order to see to it that the proper law is applied to the case. Otherwise there has been no trial on the true issues. In *United States v. Certain Parcels of Land, etc.*, 144 F. 2d 626, 630 (C. A. 3, 1944) that Court said:

> "The appropriate law must be applied in each case and upon the failure to do so appellate courts should remand the cause to the trial court to afford it opportunity to apply the appropriate law, *even if the question was not raised in the Court below. Pecheur Losenge Company, Inc. v. National Candy Company,* 315 U. S. 666, 62 S. Ct. 853, 86 L. ed. 1103." (Emphasis supplied.)

See also *Fassbinder v. Pennsylvania Railroad Company,* 322 F. 2d 859 (C. A. 3, 1963) where the plaintiff rejected a certain theory of the case which was raised by the court at the argument and then again rejected it at reargument on the appeal before the Third Circuit. Nonetheless, the Court *on its own* reversed in his favor and held that

that theory was the law of the case. In the instant case the very argument raised in the Petition for the Writ was thoroughly briefed and argued in the Court of Appeals. In *Fassbinder v. P. R. R. Co., supra,* the point was raised for the first time from the bench by the Court of Appeals. We are attaching hereto a copy of one of our briefs in the Court of Appeals which demonstrates that we made the very same argument we made here today relative to Articles 3(1) and 17—namely, that the delivery of an inadequate ticket imposes absolute, unlimited liability upon the defendant.

This proposition of law makes sense. A trial not predicated on the central essentials of law in the case is in fact and justice no trial at all.

Defendant's *ad hominem* attacks avail it nothing since it is made quite clear by the opinion of the Court of Appeals for the Third Circuit that it considered precisely this argument on the appeal. See the discussion by Judge Forman at pages 70, 71 of Appendix F. Judge Forman did not reason out the question of the adequacy of the ticket because he found that even though an inadequate ticket was delivered, it was still necessary for the plaintiff nonetheless to prove negligence even though the flight was an international flight, and, thus Warsaw. The dissent did not agree with this and it specifically reached, considered and decided this very question. It held the ticket was inadequate. It held that the ticket was just as inadequate as the ticket in *Lisi.* The same question, namely, the inadequacy or adequacy of the ticket was involved in *Lisi.* The same question is here involved. And if it is decided that this ticket was legally inadequate, as decided in *Lisi, Warren v. Flying Tiger,* 352 F. 2d 494 (C. A. 9, 1965) and *Mertens,* 341 F. 2d 851 (1965) in the Second Circuit, hold that the plaintiff may recover unlimited damages. This should be the law here.

It was respondent (airline), which in its effort to prove that this was a Warsaw case, put into evidence what it represented to be accurate and complete copies of the

ticket here in question. This was the defense in this case and was so pleaded (25a). By so doing, it succeeded in having the trial judge declare this to be a Warsaw case, with the limitations under Article 22(3) applicable to the damage issue. The judge limited the damages accordingly to $8300.

These tickets are therefore very much in evidence. They are part of the trial record. It is therefore ridiculous to argue as does Eastern that there is no record proof from which to argue the effect of Articles 3(1) and 17 of the Convention. If the tickets, having been made part of the record by Eastern, were sufficient without proof of their color, backs, size, style or type to enable Eastern to impose Warsaw's character and its limitations as found by the judge, then they were necessarily sufficient without proof of color, backs, size, style or type to require the judge or judges to determine the *legal question* of the adequacy or inadequacy of the tickets under Articles 3(1) and 17, under Warsaw as was done in *Lisi.*

The real weakness of the defendant's answer is found in the absence of any attempt by it to contend that the ticket complied with Article 3(1). We respectfully submit that this absence is intentional. For any discussion of the adequacy of the ticket places this case in the exact same status as the *Lisi* case and the result in both cases certainly should be the same. We are quite content to let the question of whether certiorari is granted in this case depend upon a determination as a matter of law whether the tickets in this case were adequate or not, as compared to the tickets in the *Lisi* case. We fearlessly state that by comparison the *Berguido* tickets fail to offer even the minimal information given by the *Lisi* tickets.

Respectfully submitted,

B. Nathaniel Richter,
Seymour I. Toll,
*Attorneys for Petitioners.*

## EXHIBIT A.

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## TABLE OF CONTENTS.


| | Page |
|---|---|
| INTRODUCTION | 1 |
| ARGUMENT | 2 |
| CONCLUSION | 8 |
| APPENDIX—The Convention for the Unification of Certain Rules Relating to International Transport by Air (Commonly Called The Warsaw Convention of 1929) | 1a |


## TABLE OF CITATIONS.


| | Page |
|---|---|
| Grey v. American Airlines, 95 F. Supp. 756 (D. C. S. D., N. Y., 1950), aff'd 227 F. 2d 282 (C. A. 2, 1955) | 2, 6, 7 |
| United States v. Certain Parcels of Land, Etc., 144 F. 2d 626 (C. A. 3, 1944) | 5 |
| Warsaw Convention, 49 Stat. 3000 (1929) | 2, 3, 4, 5, 6, 7, 8 |
| Westminster Bank, Ltd. v. Imperial Airways, Ltd., 2 All E. Rep. 890, 1 Avi. 618 (1936) | 3 |

## INTRODUCTION.

The history of this case has been turbulent. It represents years of burden for the litigants, for counsel and for the courts. In a nutshell, we now find ourselves looking back over very protracted litigation in which the plaintiff initially gained a verdict from a jury which this Court took from her on a single evidentiary point: the hearsay-based calculations.

Having successfully protested a denial of cross-examination on that evidence, defendant got its opportunity on the retrial and then chose not to use it. It is the final irony of this taxing litigation that the calculations turned out to be factually accurate.

In the latest stage of the litigation a judge without a jury, in what we deeply feel was an overzealous effort to end this litigation, found that the plaintiff did not prove the airline guilty of wilful misconduct by a preponderance of the evidence. It is in the interest of judicial administration that litigation should come to an end. But it is in the highest interest of judicial administration that it should come to an end justly.

That is why we are here.

## ARGUMENT.

### I.

As extraordinary as it may sound, the American Bench and Bar traditionally have seen Warsaw's trees but never the forest. The unseen forest is that *the Warsaw Convention is a treaty of absolute liability.*

The overwhelming tradition among American judges and lawyers is to think of Warsaw, not in terms of absolute liability at all, but in terms of this severe limitation of damages ($8,300.00). This traditional thinking has obscured the plain, fundamental and certain meaning of the Treaty. Our concession that we too have labored in this obscurity may add another thorn to the prickly history of this litigation, yet surely it is necessary for this Court to clarify the meaning of the Treaty for the case at bar and for the host of Warsaw cases that flow into our courts in ever-increasing numbers.

The structure of Warsaw needs to be identified for what it really is.

Once an international flight is within its ambit, the Convention takes hold exclusively and absolutely of the rights and the responsibilities as between passengers injured or killed on such flights and their carriers. Under Article 17 of the Treaty "The carrier *shall* be liable for damage sustained . . . [for death or bodily injury] . . ." (Emphasis supplied.)

Thus, liability under the Treaty initially is absolute. The Treaty requires of the passenger neither proof of negligence nor wilful misconduct in order for unlimited, absolute liability to attach. It imposes liability regardless of fault. In *Grey v. American Airlines,* 227 F. 2d 282 (C. A. 2, 1955), it was held at 285:

> "Article 17 imposes an absolute liability upon the carrier for all personal injuries, regardless of fault, 'if the accident which caused the damage so sustained took place on board the aircraft.'"

From that foundation of absolute and unlimited liability the text of the Convention proceeds to enumerate very technical and precisely drawn conditions precedent to the carrier's relief from such total liability. If these conditions are not *exactly* fulfilled, the liability upon the carrier remains absolute and unlimited. *Westminster Bank, Ltd. v. Imperial Airways, Ltd.*, 2 All E. Rep. 890, 1 Avi. 618 (1936).

The conditions precedent are set forth in the Convention in Article 3(1). They read as follows:

> "For the transportation of passengers the carrier *must* deliver a passenger ticket which *shall* contain the following particulars:
>
> (a) The place and date of issue;
>
> (b) The place of departure and of destination;
>
> (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
>
> (d) The name and address of the carrier or carriers;
>
> (e) A statement that the transportation is subject to the rules relating to liability established by this convention." (Emphasis supplied.)

The heart of this brief is that three of these conditions precedent were never fulfilled by the defendant carrier, and we shall shortly turn to that discussion. Prior to doing so, we respectfully submit what we believe to be the proper and indeed only accurate view of the pattern of the Treaty.

Assuming satisfaction of all of these conditions precedent, the absolute and unlimited liability of the Treaty is subject to the following legal possibilities:

1. If the carrier proves that it and its agents have taken all necessary measures to avoid damage or that it was impossible for them to take such measures, the carrier is discharged of all liability. Article 20.

2. Assuming that the carrier cannot prove that it has taken all necessary measures to avoid the damage or that it was impossible for it to take such measures, the carrier is absolutely liable for not more than $8,300.00. Article 22(1).

3. If, however, the claimant can prove that the damage was caused by the wilful misconduct of the carrier, then the carrier may neither exclude nor limit its liability. Article 25.

In this case the conditions precedent were not satisfied, and therefore the defendant is absolutely and unlimitedly liable under Article 17. We shall now demonstrate the accuracy of this conclusion.

## II.

In the face of the record, Judge Boldt's findings of fact are irrelevant. As a matter of law he was bound to grant plaintiff's motion for judgment at the conclusion of the evidence (1248a-1249a).

The wilful misconduct aspect of this case has been treated extensively in our earlier briefs. It is to the legal consequence of the inadequate ticket that we now turn.

When we filed our earlier brief on this appeal we did not apprehend what we now know is the true legal nature of Warsaw's scheme of liability. We therefore did not accurately argue the legal consequences of defendant's non-compliance with the Treaty. Our failure to present what is in truth the appropriate law should be corrected now before oral argument.

It has always been the law of this Circuit that "The appropriate law must be applied in each case and upon a failure to do so appellate courts should remand the cause to the trial court to afford it opportunity to apply the

appropriate law, *even if the question was not raised in the court below.*" (Emphasis supplied.) *United States v. Certain Parcels of Land, Etc.*, 144 F. 2d 626, 630 (C. A. 3, 1944).

As our first brief here pointed out, this record demonstrates that defendant failed to satisfy the strict requirements of Article 3(1) of the Convention in these three specific respects:

1. The record does not reveal an adequate delivery of the ticket in compliance with the requirements of Article 3(1). There is an absolute failure of proof as to how, when and under what circumstances the ticket was delivered (if it was delivered) to Mr. Berguido.

2. The ticket fails to comply with Article 3(1)(e) in that it does not explicitly disclose the restrictions of Warsaw, and because the clause in question is printed in such fine print that it is practically illegible.

3. The ticket fails to comply with Article 3(1)(c) in that it does not set forth Jacksonville as one of the "agreed stopping places".

If, among other things, the defendant either failed to show an adequate delivery of an appropriate ticket—one which adequately and explicitly warned on its face of Warsaw's exclusions and limitations as well as declaring Jacksonville as an agreed stopping place—it is bound in absolute and unlimited liability from which it may not claim relief. This is the crux of the entire litigation. Understanding Warsaw for what it really is, we finally see the case in its proper light: defendant is absolutely, unlimitedly liable for the death of Mr. Berguido.

Our earlier brief on this appeal discussed the nondelivery of the ticket, its illegibility, and its omission of an adequate statement that the transportation is subject to the limitation set forth in Warsaw.

It is necessary to add to that material only the following discussion with respect to the absence of Jacksonville—an agreed stopping place—on the ticket.

Jacksonville was an agreed stopping place. It was not on the ticket. Standing alone, this omission violates Article 3(1)(c) and absolute, unlimited liability attaches. This proposition raises *Grey v. American Airlines,* 95 F. Supp. 756 (D. C. S. D., N. Y., 1950), aff'd. 227 F. 2d 282 (C. A. 2, 1955).

*Grey* holds the carrier's failure to place an agreed stopping place on the ticket does not prevent the carrier from taking advantage of the limitations of damages available under Warsaw. We respectfully submit that *Grey* was wrongly decided and cannot be the law.

In order to understand *Grey,* it is necessary to understand those portions of the Convention dealing with "Transportation Documents". Article 3 involves "Passenger Ticket", Article 4 "Baggage Check" and Articles 8 and 9 "Air Waybill".

In each of these Articles there is a sub-section, specifying those particulars which "shall" be contained in the subject document. In Article 3 (passenger ticket) there is no provision contemplating the carrier's deletion of any of the five enumerated particulars. In Article 4(4) (baggage check) there is such a provision contemplating deletion of certain particulars as there also is in Article 9 (air waybill).

Faced with this scheme of the Transportation Documents Chapter of the Convention, the *Grey* court observed that Article 4(4) and 9 in effect specified certain minimal particulars which must be declared on either baggage checks or air waybills in order for the carrier to raise Warsaw defenses. Reasoning that since the Treaty has no comparable provision for passenger tickets (Article 3[2], *Grey* erroneously held that the passenger ticket did not have to contain any particulars. Delivery alone gave the carrier Warsaw's defenses.

Although agreeing with plaintiff that the ticket was incomplete, *Grey* rejected plaintiff's argument that the ab-

sence of agreed stopping places stripped the carrier of its defenses. This feature of the *Grey* case was affirmed by the Court of Appeals for the Second Circuit without discussion.

The grotesque consequence of its holding is that if *Grey* is the law, so long as *delivery* of a "passenger ticket" (whatever that is) is made, even though it may not disclose the place and date of its issuance (Article 3(1)[a]); the place of departure and destination of the flight (Article 3(1)[b]); the agreed stopping places of the flight (Article 3(1)[c]); the name and address of the carrier (Article 3(1)[d]); and a statement of Warsaw's limitations on the flight (Article 3(1)[e]), nonetheless such a delivered "passenger ticket' will allow the carrier to avail itself of the exclusions and limitations of the Warsaw Convention.

The mere statement of this unavoidable consequence of the *Grey* holding is proof enough that it is juridically intolerable. If *Grey* is right, Article 3(1) of the Warsaw Convention is a piece of meaningless international law which international carriers may ignore without consequence.

Exactly contrary to *Grey*, the meaning of the difference between Article 3 and the others is that *every* particular on the passenger ticket is indispensable to the creation of a ticket which gives the carrier its Warsaw defenses. The contrast between the categorical character of tickets under Article 3 and the qualified character of other transportation documents compels this conclusion. In other words, the very fact that Articles 4 and 9 contain statutory dilution of the apparently mandatory requirements of those articles and Article 3 contains no such dilution is a conclusive argument that no dilution of Article 3's requirements was either intended or permissible.

## CONCLUSION.

If this Court concludes that the flight was within the ambit of the Warsaw Convention, then our previous argument that defendant's failure to prove delivery of an adequate ticket removes this case from Warsaw and places it in negligence is erroneous. Under the proper view of the true nature of the Warsaw Convention it is now clear that the defendant's failure to prove the delivery of an adequate ticket makes the defendant absolutely liable without limitation.

It is respectfully submitted that the judgment below be reversed.

Respectfully submitted,

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No. 528

# In the Supreme Court of the United States

OCTOBER TERM, 1967

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MARION J. BERGUIDO, ET AL., PETITIONERS

*v.*

EASTERN AIRLINES, INCORPORATED

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

---

## MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

---

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## INDEX


| | Page |
|---|---|
| Discussion | 6 |
| Conclusion | 12 |
| Appendix | 15 |


## CITATIONS

Cases:


| | |
|---|---|
| *Berenyi* v. *Immigration Director*, 385 U.S. 630 | 13 |
| *Berguido* v. *Eastern Air Lines, Incorporated*, 35 F.R.D. 200 | 2, 11 |
| *Berguido* v. *Eastern Air Lines, Incorporated*, 317 F.2d 628, certiorari denied, 375 U.S. 895 | 2, 11 |
| *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271 | 13 |
| *Grey* v. *American Airlines*, 95 F. Supp. 756, affirmed, 227 F.2d 282, certiorari denied, 350 U.S. 989 | 7, 8, 13 |
| *KLM* v. *Tuller*, 292 F.2d 775, certiorari denied, 368 U.S. 921 | 8 |
| *Komlos* v. *Compagnie Nationale Air France*, 111 F. Supp. 393, reversed, 209 F.2d 436, certiorari denied, 348 U.S. 820 | 7 |
| *LeRoy* v. *Sabena Belgian World Airlines*, 344 F.2d 266, certiorari denied, 382 U.S. 878 | 8 |
| *Lisi* v. *Alitalia-Linee Aeree Italiane*, 253 F. Supp. 237, affirmed, 370 F.2d 508, certiorari granted November 6, 1967, No. 70, this Term | 6, 7, 9, 11, 12, 13 |

Cases—Continued Page

*Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851, certiorari denied, 382 U.S. 816 ..... 9, 12

*Noel* v. *Linea Aeropostal Venezolana*, 247 F.2d 677, certiorari denied, 355 U.S. 907 ..... 7

*Seth* v. *British Overseas Airways Corp.*, 329 F.2d 302, certiorari denied, 379 U.S. 858 ..... 12

*Warren* v. *Flying Tiger Line, Inc.*, 352 F.2d 494 ..... 9, 12

Statute and rule:

Warsaw Convention, 49 Stat. 3000, *et seq.*:

Article 1 ..... 2, 3, 15
Article 3 ..... 4, 8, 9, 10, 12, 13, 15
Article 17 ..... 7, 16
Article 20 ..... 7, 10, 16
Artiele 21 ..... 7, 8
Article 22 ..... 17
Article 25 ..... 3, 8, 17

Federal Rules of Civil Procedure, Rule 2(a) ..... 2

Miscellaneous:

Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967) ..... 8

S. Ex. Doc. No. G, 73d Cong., 2d Sess. (1934) ..... 7, 8

# In the Supreme Court of the United States

OCTOBER TERM, 1967

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No. 528

MARION J. BERGUIDO, ET AL., PETITIONERS

*v.*

EASTERN AIRLINES, INCORPORATED

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

---

## MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

---

This memorandum is submitted in response to the Court's order of November 13, 1967, inviting the Solicitor General to express the views of the United States.

On December 21, 1955, an Eastern Airlines flight, on which Carlos Berguido was returning to Philadelphia after a trip to San Salvador, crashed while attempting to land at Jacksonville, Florida. Petitioners sued Eastern to recover for Mr. Berguido's death in that accident. Eastern asserted that Mr. Berguido's flight constituted "international transportation" within the

meaning of Article 1(1) and (2) of the Warsaw Convention,[1] and, therefore, that its liability to petitioners was limited by the terms of that Convention to approximately $8,300. Petitioners, however, refused the tender of that sum.

After a number of abortive proceedings,[2] the parties agreed to a trial to the district court without a jury. In its opinion,[3] the trial court found that the fatal flight was an "international" one within the meaning of the Warsaw Convention (Resp. App. 24).[4]

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[1] Formally titled, "Convention for the Unification of Certain Rules Relating to International Transportation by Air," but commonly referred to by the name of the city in which it was concluded on October 12, 1929. It was adhered to by the United States in 1934, 49 Stat. 3000; T.S. No. 876. The relevant portions of the Convention are set forth in the Appendix to this memorandum, *infra*, pp. 14-16.

[2] There were four prior trials in this case, each of which was set aside on grounds not relevant here, and at least one full-dress appeal on a collateral point. See, *Berguido* v. *Eastern Air Lines, Incorporated*, 317 F.2d 628 (C.A. 3, 1963), rehearing denied, 317 F.2d 633, certiorari denied, 375 U.S. 895; and *Berguido* v. *Eastern Air Lines, Incorporated*, 35 F.R.D. 200 (E.D. Pa., 1964). See, also, the decision of the court of appeals from which certiorari is sought, *Berguido* v. *Eastern Air Lines, Incorporated*, 369 F.2d 874, 875, nn.3-6 (Pet. App. 64).

[3] The parties apparently "waived" the requirement of Rule 52(a) of the Federal Rules of Civil Procedure, that the court make specific findings of fact and conclusions of law. See Appendix A to Eastern's Brief in Opposition to certiorari, p. 23.

[4] "Pet. App." refers to the appendix to the Petition for Certiorari, "Resp. App." to the appendix to Eastern's Brief in Opposition, and "Reply App." to the appendix to petitioners' Reply Brief.

For this reason the court held that Eastern's liability to petitioners was limited to the $8,300 tendered, unless petitioners sustained the burden of proving that the accident was caused by the "willful misconduct" of Eastern or its employees, which under Article 25 of the Convention (*infra*, p. 16) would lift the limitation (Resp. App. 25). After reviewing the evidence, the district court concluded that the preponderance of evidence did not establish that "willful misconduct, negligence or fault on the part of" Eastern or its crew had caused the crash (Resp. App. 27). It therefore held petitioners "entitled to recover against [Eastern] only as limited by the Warsaw Convention in the amount of $8,300, the sum previously tendered * * *" (Resp. App. 30). It would appear that the question of the applicability of the Convention related only to whether the abortive Miami-to-Washington-to-Philadelphia leg of the journey was "international transportation" within the meaning of Article 1(2) of the Convention. Thus, the district court's opinion makes no mention of any dispute between the parties as to whether the passenger ticket that Eastern provided to Mr. Berguido satisfied the requirements of the Warsaw Convention.

When petitioners appealed to the Third Circuit, they urged, *inter alia*, that the Warsaw Convention made Eastern absolutely liable for injuries to its passengers occurring on international flights, and that, because Eastern had accepted Mr. Berguido as a passenger on such a flight without giving him a ticket meeting the requirements of the Convention, the airline could not invoke the Convention's provisions lim-

iting its liability to $8,300. In pertinent part, Article 3(1) of the Warsaw Convention provides (49 Stat. 3015):

> For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
>
> * * * *
>
> (c) The agreed stopping places, * * *;
>
> * * * *
>
> (e) A statement that the transportation is subject to the rules relating to liability established by this convention.

Article 3(2) further provides (*ibid.*):

> The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. *Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.* [Emphasis added.]

In substance, petitioners contended both that Eastern's ticket failed to set out all the agreed stopping places (it omitted Jacksonville, for one) as required by Article 3(1)(c) of the Convention, and that the statement on the ticket that the flight was subject to the Warsaw Convention was printed in language too vague and in type too small to constitute compliance with Article 3(1)(e).

Eastern responded that petitioners were precluded from raising on appeal an issue as to the adequacy of the ticket because they had failed to raise it in the trial court and, indeed, had eliminated it from the case.[5] It was for this reason, Eastern asserted, the district court had made no findings on the adequacy of the ticket and Eastern had not attempted to show that Mr. Berguido, an attorney specializing in international law, not only had actual notice of the Convention's application to his flight but in fact had purchased flight insurance before the ill-fated trip.[6]

On November 23, 1966, a divided court of appeals affirmed the judgment. *Berguido* v. *Eastern Air Lines, Incorporated*, 369 F.2d 874 (Pet. App. 63-86). The majority found it unnecessary to reach the ticket issue. Instead, they read the Warsaw Convention as imposing absolute liability for passenger injuries on international air carriers up to $8,300 and additional monetary liability if the plaintiff could show that the carrier's "wilful misconduct" contributed to the accident; but where the carrier failed to deliver a passenger ticket, plaintiff was only required to prove negligence on the carrier's part to recover damages in excess of $8,300. Holding that the findings of the trial court that petitioners had failed to prove either negligence or wilful misconduct were not "clearly erroneous," the court of appeals determined that it need not pass upon the contentions that Eastern had failed

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[5] See Brief in Opposition, p. 9.

[6] See Brief in Opposition, pp. 12-13, n.9.

to deliver an adequate ticket or that—as Eastern asserted—petitioners had waived that argument at trial.

Circuit Judge Kalodner dissented. His principal concern was that a new trial should have been granted because the findings on negligence were internally inconsistent and in significant part clearly erroneous. Although he noted that only part of the ticket was in evidence (369 F. 2d at 885, n. 11, Pet. App. 84), Judge Kalodner expressed his opinion that the notice referring to the Warsaw Convention appearing on the part of the ticket that was in the record was similar to the notice found inadequate in *Lisi* v. *Alitalia-Linee Aeree Italiane*, 253 F. Supp. 237 (S.D.N.Y.), and that he agreed with the holding in that case.

Petitioners' motion for rehearing *en banc* was denied by a vote of 6-2 (Pet. App. 62), Judge Kalodner, joined by Chief Judge Staley, voting for rehearing on the ground that the majority's decision conflicted with *Lisi* v. *Alitalia-Aeree Italiane*, 370 F.2d 508 (C.A. 2), certiorari granted, November 6, 1967, No. 70, this Term (Pet. App. 58).

## DISCUSSION

In our view, the Court of Appeals for the Third Circuit has misread the Warsaw Convention. It does not follow automatically, however, that the court erred in affirming the district court's award of $8,300 to petitioners. Moreover, the rather confused and incomplete state of the record in this case on the questions presented in *Lisi* suggests that it would not

be conducive to a resolution of the issues in *Lisi* to accord the instant case plenary consideration. We suggest, for the reasons explained below, that action on the present petition for a writ of certiorari should be deferred until *Lisi* is decided on the merits.

1. The Warsaw Convention provides that an air carrier "shall be liable" for bodily injury or death occurring to a passenger while on board the carrier's aircraft (Art. 17) unless the carrier "proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible * * * to take such measures" (Art. 20(1)), or "that the damage was caused by or contributed to by the negligence of the injured person * * *" (Art. 21). Thus, the Convention makes negligence the predicate of liability, but conclusively presumes such negligence unless the carrier meets the burden of proving to the contrary; that is, the carrier can exonerate itself if it can show that it had taken all necessary measures to avoid the injury or that it was impossible to do so.[7]

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[7] *Noel* v. *Linea Aeropostal Venezolana*, 247 F. 2d 677, 679 (C.A. 2), certiorari denied, 355 U.S. 907; *Grey* v. *American Airlines*, 227 F. 2d 282, 285 (C.A. 2), certiorari denied, 350 U.S. 989; *Komlos* v. *Compagnie Nationale Air France*, 111 F. Supp. 393, 401 (S.D. N.Y.), reversed on other grounds, 209 F. 2d 436 (C.A. 2), certiorari denied, 348 U.S. 820. In his message transmitting the Warsaw Convention to the Senate for ratification, then Secretary of State Hull noted:

> The principle of placing the burden on the carrier to show lack of negligence in international air transportation in order to escape liability, seems to be reasonable in view of the difficulty which a passenger has in establishing the cause of an accident in air transportation.

Senate Committee on Foreign Relations, *Message from the*

However, if the carrier fails to shoulder this burden, and is thus automatically liable, the amount of its liability for an individual injury or death is—without more—limited by the Convention to approximately $8,300 (Art. 22(1)).

There are occasions, however, when the Convention precludes a carrier from invoking the limitation of liability for passenger injuries; in such cases full damages are recoverable. One of these exceptions—alleged by petitioners throughout—is where the injury was caused by the carriers' "wilful misconduct" (Art. 25(1)). As petitioners appear to recognize (Pet. 34-49), the burden of precluding reliance on the limitation of liability, by showing "wilful misconduct," rests on a claimant. See *LeRoy* v. *Sabena Belgian World Airlines*, 344 F.2d 266 (C.A. 2), certiorari denied, 382 U.S. 878; *KLM* v. *Tuller*, 292 F.2d 775 (C.A.D.C.), certiorari denied, 368 U.S. 921; *Grey* v. *American Airlines*, *supra*, 227 F.2d at 285.

In addition, a carrier's liability is not limited by the Convention if it has failed to comply with the requirements of Article 3 that it deliver a passenger ticket giving notice that the flight is subject to the Convention's rules limiting liability. This condition has been construed to have been violated when the carrier delivers the ticket too late for the passenger

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*President of the United States Transmitting a Convention for the Unification of Certain Rules*, S. Exec. Doc. No. G, 73d Cong., 2d Sess. 4 (1934). See, also, Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 500, 519-522 (1967).

to obtain insurance or other financial protection, *Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851, 856 (C.A. 2), certiorari denied, 382 U.S. 816; *Warren* v. *Flying Tiger Line, Inc.*, 352 F.2d 494, 497 (C.A. 9); or when the required statement is printed on the ticket in such a manner as to be so unnoticeable and illegible as to fail to satisfy the purpose of Article 3, *Lisi* v. *Alitalia-Linee Aeree Italiane*, 370 F.2d 508 (C.A. 2), certiorari granted, November 6, 1967, No. 70, this Term.

Thus, insofar as the opinion below suggests that a carrier's failure to provide a passenger ticket satisfying the requirements of Article 3 merely permits recovery in excess of $8,300 if a claimant proves ordinary negligence instead of "wilful misconduct" (Pet. App. 71), it is incorrect. As the authorities cited make clear, acceptance of a passenger without providing a proper ticket does not disturb the presumptive liability imposed on air carriers by the Convention; the claimant still bears no burden of proving negligence. Rather, the effect of the failure of the carrier to deliver a ticket in accordance with Article 3 is to bar the carrier's right to avail itself of the Convention provisions limiting liability to $8,300 per passenger. Consequently, if a claimant proves that a carrier has defaulted on its Article 3 obligations, the carrier can be held liable for actual damages unless it shows that it took all appropriate measures to avoid the injury.

2. It does not follow from the foregoing, however, that the *judgment* of the court of appeals in this case

was necessarily incorrect, or that this Court should review these proceedings. Petitioners' right to recover damages in an amount unlimited by the Convention depends upon a *factual* showing that Eastern accepted Mr. Berguido as a passenger without giving him a ticket that was adequate under Article 3.[8] The district court made no finding on this issue; both the majority (Pet. App. 72) and the dissenting judges (Pet. App. 84-85) in the court of appeals expressly declined to pass on the correctness of petitioners' factual assertions on this point. If Eastern is correct in arguing, as it did below, that at trial petitioners waived any claim to recovery based on non-delivery of a proper ticket under Article 3, then the Third Circuit's affirmance of the district court's award of $8,300 in damages to petitioners is correct, notwithstanding that court's erroneous understanding of the workings of the Warsaw Convention.[9]

We are unable to determine from the papers avail-

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[8] There is no question as to Eastern's liability, since it voluntarily tendered $8,300 in damages to petitioners and did not appeal from the district court's judgment for that sum. The only issue presented here is whether Eastern is entitled to limit its liability to that figure by virtue of the Warsaw Convention.

There is also no longer any dispute that the flight in question is covered by the Warsaw Convention (Pet. App. 69).

[9] Whether or not there is merit to the position of the dissenting judges below (Pet. App. 58, 82-83) that the award of $8,300 to petitioners is inconsistent with the district judge's suggestion that Eastern might not have been negligent at all, Eastern did not cross-appeal and has not cross-petitioned to urge that under Article 20(1) this finding precludes imposition of any liability.

able to us whether petitioners did waive this point.[10] In fact, petitioners candidly concede that not at least until their reply brief filed in the court below did they happen on their present legal theory (See Reply Brief in this Court, Ex. A, pp. 2, 4, 8). In any event, whether or not petitioners have formally waived this contention, we think it plain that the present state of the record provides an insufficient basis for determining whether Eastern failed to deliver an adequate ticket to Mr. Berguido and for this reason may not limit its liability to $8,300. To begin with, only one segment of the ticket is in the record.[11] Additionally, Eastern asserts in its Opposition that the late Mr. Berguido was an attorney specializing in international law, that he was in fact fully aware of the Convention's provisions limiting a carrier's liability, and that he even purchased flight insurance concurrently with the tickets in question.[12] This, too, is not a matter of record,[13] although petitioners do not controvert these assertions in their papers in this Court.

For the reasons given in our memorandum as *amicus curiae* in *Lisi, supra*, it is our position that a

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[10] We do note, however, that, aside from the decision below, none of the other reported decisions in this litigation make the slightest reference to the adequacy of the ticket delivered to Mr. Berguido. See the reports of *Berguido* v. *Eastern Air Lines, Incorporated*, at 317 F. 2d 628; 35 F.R.D. 200; and Resp. App. 23-30. See, also, petitioners' Reply Brief, p. 4.

[11] See Pet. App. 84, n. 11.

[12] See Brief in Opposition, pp. 12-13, n. 9.

[13] Eastern asserts it did not endeavor to establish these points at the latest trial in this case because it was led to believe that petitioners were not raising the ticket issue. *Ibid.*

ticket warning couched in type too small to attract reasonable notice is not of itself adequate compliance with Article 3 of the Convention. But where such a legend does *in fact* adequately inform a prospective passenger of the Convention's limitations on air carrier liability, there may be considerations justifying the limitation on liability that are not present in *Lisi*. We note particularly that there is general agreement among the circuits that the purpose of Article 3 is simply to give passengers sufficient warning to enable them, if they wish, to make other arrangements for financial protection. See *Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851, 856 (C.A. 2), certiorari denied, 382 U.S. 816; *Warren* v. *Flying Tiger Line, Inc.*, 352 F.2d 494, 497 (C.A. 9); cf. *Seth* v. *British Overseas Airways Corp.*, 329 F.2d 302, 307 (C.A. 1), certiorari denied, 379 U.S. 858. We conclude that this record does not fairly raise the issues presented in *Lisi*. It is true, to be sure—assuming that *Lisi* correctly decided that delivery of a ticket with an inadequate notice precludes limitation of liability—that the question whether actual notice cures this defect becomes significant. But we believe that this case, at least in its present posture, is not an appropriate vehicle for deciding that issue either, since it lacks both record foundation for the claim and pertinent exploration by the lower courts.

## CONCLUSION

In the circumstances, we suggest that, instead of acting on the petition at this point, this Court might hold the case pending resolution of *Lisi* v. *Alitalia*,

*supra*. If the Court agrees with the Second Circuit's conclusions in *Lisi*, it would appear appropriate to remand the instant case for reconsideration in light of that decision, with additional instructions to determine whether petitioners have waived any claims based on the adequacy of respondent's tickets and whether Eastern has additional grounds entitling it to limit its liability under the Convention. If this Court should reverse *Lisi*, the present petition should be denied.[14]

Respectfully submitted.

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EDWIN L. WEISL, JR.,
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MORTON HOLLANDER,
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*Attorneys.*

DECEMBER 1967.

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[14] The remaining issues raised by the petition do not merit a grant of certiorari. First, as to the omission of agreed-upon stopping places from the ticket, there is no serious question but that this is not a material violation of Article 3 of the Warsaw Convention where the ticket plainly indicates—as did the one in question—that the flight is an international one. See, *Grey* v. *American Airlines*, 95 F. Supp. 756 (S.D. N.Y.), affirmed as to this point on the opinion of the district court, 227 F. 2d 282 (C.A. 2), certiorari denied, 350 U.S. 989; *Lisi* v. *Alitalia*, *supra*, 370 F. 2d at 513, n. 8. Second, both courts below agreed that the accident in suit was not caused by Eastern's "wilful misconduct". The correctness of these concurrent factual findings is not an issue meriting re-examination by this Court. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636; *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

## APPENDIX

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, the Warsaw Convention, 49 Stat. 3000, *et seq.*, provides in pertinent part:

Article 1:

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this Convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

* * * *

Article 3:

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

Article 17:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 20:

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

* * * * *

Article 22:

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

* * * * *

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Article 25:

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

* * * * *

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IN THE

# Supreme Court of the United States

October Term, 1967

## No. 528.

MARION J. BERGUIDO, Individually, MARION J. BERGUIDO, ROBERT G. ROWE and WARREN H. WOODRING, Executors of the Estate of CARLOS BERGUIDO, JR., and JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO and CARLOS BERGUIDO, 3rd, by Their Guardian, MARION J. BERGUIDO,

*Petitioners,*

*v.*

EASTERN AIRLINES, INCORPORATED,

*Respondent.*

## MEMORANDUM IN RESPONSE TO THE SOLICITOR GENERAL'S MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE.

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Petitioners respectfully submit this memorandum in comment upon the Solicitor General's memorandum for the United States as *Amicus Curiae*.

We shall summarize the United States' position as we understand it, and then offer those brief comments which we feel are appropriate.

1. The Court of Appeals below "has misread the Warsaw Convention". (Memorandum, p. 6).

We agree.

2. The United States believes that the legal effect of a carrier's failure to satisfy the ticket provisions of Article 3 by failing to deliver a proper ticket is to "bar the carrier's right to avail itself of the Convention's provisions limiting liability to $8,300 per passenger." (Memorandum, p. 9).

We agree.

3. The United States argues that if the carrier fails to comply with Article 3, it can "be held liable for actual damages unless it shows that it took all appropriate measures to avoid the injury." (Memorandum, p. 9).

We disagree with the government's construction to this crucial extent. Once a breach of Article 3 occurs, the Convention imposes absolute liability, and the carrier is absolutely barred from raising *any* defenses one of which is "that it took all appropriate measures to avoid the injury". We believe that is the clear meaning of the Convention's Article 3(2) which provides:

> "The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the

less be subject to the rules of this convention. *Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.*" (Emphasis supplied.)

Our suggested construction is totally consistent with the plain language of the provision. It is completely confirmed by *Westminster Bank, Ltd. v. Imperial Airways, Ltd.*, 2 All E. Rep. 890, 1 Avi. 618 K. B. (1936). Not only the English courts so understand the Convention but two federal circuits also point in the same direction. *Warren v. Flying Tiger Line, Inc.*, 352 F. 2d 494 (C. A. 9, 1965) and the remand in *Glassman et al. v. Flying Tiger Line*, 9 Avi. 18,295 (D. C., N. D. Cal., 1966); *Alitalia-Linee Aeree Italiane S. p. A. v. Lisi*, 370 F. 2d 508 (C. A. 3, 1966), cert. granted, 6 November 1967, Appellate Docket No. 70. Simply stated, in our view a carrier which fails to deliver a proper ticket is absolutely and unlimitedly liable and is not permitted to offer any defense to either limit or exclude its liability.

But the Court of Appeals below has taken directly conflicting views. *Berguido v. Eastern Airlines, Inc.*, 369 F. 2d 874, 879 (C. A. 3, 1966).

By holding that even though an inadequate ticket has been delivered the burden is still upon a plaintiff to prove negligence, the Court of Appeals below has rejected both the position of petitioners here that in such instance there is absolute liability, and also the position of *Mertens v. Flying Tiger Line, Inc.*, 341 F. 2d 851 (C. A. 2, 1965), cert. denied 382 U. S. 816 (1965), rehearing denied 382 U. S. 933 (1965), and the Solicitor General. Both *Mertens* and the Solicitor General agree that, given an inadequate ticket, the *carrier*

must prove that "it took all appropriate measures to avoid the injury."

Now we have not only conflicts between circuits but the further grave complication of the United States—a major signatory to this important convention—construing it in a way which aggravates the conflict between the Second and Third Circuits.

We respectfully submit that this is a classic example of a situation in which this Honorable Court should exercise its powers of certiorari. Not to do so in an era of enormous expansion of international air traffic is gravely to compound the serious legal difficulties which increasingly surround the Convention.

For this reason alone, the Petition ought to be granted. It is the occasion for announcing a long overdue and authoritative instruction on the meaning of this muddied body of important law.

Such an instruction is crucial not only to the disposition of this case but to *Lisi* as well. If this Court decides that the *Lisi* ticket is legally inadequate, the trial court in *Lisi* will have to decide whether (1) the trial should proceed on the issue of damages alone—as we contend—; or (2) whether the trial should proceed with the defendant permitted to establish "that it took all appropriate measures to avoid the injury"—as *Mertens* holds and the Solicitor General contends;* (3) or whether the plaintiff in *Lisi* must bear the burden of proving negligence—as the *Berguido* Court of Appeals held.

These are the irreconcilable conflicts in the state of Warsaw law in the United States today, and the reason that this case should be granted certiorari.

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* This problem is not present in the case at bar. Respondent has admitted that it cannot establish "that it took all appropriate measures to avoid the injury" by tendering the $8,300.

4. The United States suggests that "the present state of the record provides an insufficient basis for determining whether Eastern failed to deliver an adequate ticket . . .". (Memorandum, p. 11.)

We disagree.

The record on this issue has been made. Eastern Airlines had an opportunity to make it. Indeed, to meet its burden of proof it had the duty to make a record on the ticket issue. Eastern Airlines used that opportunity to make its defense.

In the face of the trial record, it is nothing less than shocking to read its argument at pp. 7-13 of its brief herein, and to read this brazenly inaccurate statement at p. 2 of that brief: "The ticket is not in evidence . . .".

What does the trial record show? In the Appendix herewith (pp. 760a-762a of the trial record) counsel for Eastern Airlines literally began his client's defense of this case by offering "the tickets" into evidence. It was the very first piece of evidence in Eastern Airlines' case. In obvious recognition of a Warsaw defendant's burden to prove the applicability of the Convention by first proving the crucial ticket requirements, counsel for this respondent carrier made that effort to carry its burden.

"The tickets", to use this respondent's own words, are most certainly in evidence. This respondent put them there. It is inexcusable to see counsel for respondent making absolutely antithetical representations to this Honorable Court.

We have waived nothing with respect to the tickets. What we have done is a very different thing, and that is to confess our misunderstanding of the legal significance of a breach of Article 3(2). But that confession was made in the Court of Appeals below, and it was fully briefed and argued in advance of judgment and again in our motion for a rehearing below.

The government has unfortunately put forth statements about the decedent which are admittedly not of record, statements which got into this case through the overzealousness of counsel for respondent. This is not the occasion to deal those statements the death blows they deserve.

Putting aside this respondent's indefensible injection of matters *de hors* the record, we see the government using them as a basis for "pertinent exploration by the lower courts" (Memorandum, p. 12) and also casting further confusion into the central issue here and *Lisi:* what are the legal consequences of a ticket which fails to satisfy the demands of the Warsaw Convention?

The record on "the ticket" has been made by this respondent. The lower courts had "the ticket" before them. The judgment of the Court of Appeals was rendered only after that matter was fully presented to it. The case is ripe for adjudication here. To say this is to say all that need be said about the appropriateness of granting certiorari rather than returning the matter to the lower courts here. It is all the more appropriate when we simply add that the catastrophe which killed Carlos Berguido occurred more than twelve years ago.

Respectfully submitted,

B. Nathaniel Richter,
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*Of Counsel:*
Seymour I. Toll.

(904)

Mr. Griffin: The first thing I will offer are certain requests for admissions which have been identified as Defendant's Exhibit 12, requests for admission. The requests were made and no answers filed to the requests.

The Court: Read them into the record.

Mr. Griffin: Yes, sir.

"Defendant, Eastern Air Lines, Incorporated, requests plaintiffs, Marion J. Berguido, individually, Marion J. Berguido, Robert G. Rowe and Warren H. Woodring, Executors of the Estate of Carlos Berguido, Jr., and June Berguido, Joy Berguido, Jill Berguido and Carlos Berguido, III, by their Guardian, Marion J. Berguido, within ten days after service of this Request, to

(905)

make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:"

Mr. Richter: Would you read a little slower? Excuse me. I didn't mean to interrupt, but you are speaking so fact.

Mr. Griffin: "1. That each of the following documents, attached hereto as exhibits and made a part thereof, is genuine.

"(a) Ticket No. 0263-20-558431, Flight Coupon No. 1, issued by Pan American World Airways System to Carlos Berguido, Jr., providing air transportation from Philadelphia, Pennsylvania, to Washington, D. C.

"(b) Ticket No. 0263-20-558431, Flight Coupon No. 2, issued by Pan American World Airways System to Carlos Berguido, Jr., providing air transportation from Washington, D. C., to New Orleans, Louisiana.

"(c) Ticket No. 0263-20-558431, Flight Coupon No. 3, issued by Pan American World Airways System to Carlos Berguido, Jr., providing air transportation from New Orleans, Louisiana, to San Salvador.

(906)

"(d) Ticket No. 0263-20-558432, Flight Coupon No. 1, issued by Pan American World Airways System to Carlos Berguido, Jr., providing air transportation from San Salvador to Miami, Florida.

"(e) Ticket No. 0263-20-558432, Flight Coupon No. 2, issued by Pan American World Airways System to Carlos Berguido, Jr., providing air transportation from Miami, Florida, to Washington, D. C.

"2. That Carlos Berguido, Jr., was a fare-paying passenger aboard Eastern Air Lines Flight No. 642 of December 20, 1955, under and pursuant to Ticket No. 0263-20-558432, Flight Coupon No. 2, issued by Pan American World Airways System, a copy of which said ticket is attached hereto and made a part hereof, and that said ticket was purchased by or on behalf of the said Carlos Berguido, Jr., at the same time as were the other tickets hereto attached, made a part hereof and referred to in Request for Admission No. 1.

"3. That *the tickets,* copies of which are hereto attached and made a part hereof, provided the said Carlos Berguido, Jr., with round trip transportation from Philadelphia, Pennsylvania, U. S. A., to San Salvador, a foreign country, and return."

(907)

Attached to the requests, Your Honor, are copies of the various coupons referred to in the requests, and I would submit them and offer them in evidence.

The Court: You say the record shows that these never were responded to?

(Emphasis supplied.)

* * *

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IN THE

# Supreme Court of the United States

October Term, 1967

## No. 528.

MARION J. BERGUIDO, Individually, MARION J. BERGUIDO, ROBERT G. ROWE and WARREN H. WOODRING, Executors of the Estate of CARLOS BERGUIDO, JR., and JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO and CARLOS BERGUIDO, 3rd, by Their Guardian, MARION J. BERGUIDO,

*Petitioners,*

*v.*

EASTERN AIRLINES, INCORPORATED,

*Respondent.*

## RESPONDENT'S MEMORANDUM IN RESPONSE TO THE SOLICITOR GENERAL'S MEMORANDUM AND PETITIONERS' COMMENT CONCERNING IT.

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## INDEX.


| | Page |
|---|---|
| The Solicitor General Has Reached a Wrong Recommendation | 1 |
| With Respect to Carlos Berguido's Experience as an International Lawyer the Solicitor General Was Misled by Petitioner's Failure to File the Record Required by This Court's Rules | 3 |
| With Respect to "Waiver" the Solicitor General Has Not Examined the Record Carefully | 5 |
| The Solicitor General's Recommended Procedure | 8 |
| 1. The Recommendation Is Contrary to Substantial Justice | 8 |
| 2. The Recommendation Requires the Exercise of Jurisdiction Which Does Not Exist | 10 |
| 3. The Recommendation Is Non-Judicial | 11 |
| Suggested Alternative Disposition | 13 |
| Appendix: | |
| Notification of Contents of Record | A1 |
| Plaintiffs' Motion to Set Aside Verdict | A2 |
| Exceptions to Findings of Fact | A4 |

## TABLE OF CASES CITED.


| | Page |
|---|---|
| Chicago & Northwestern Ry. Co. v. Britten, 301 F. 2d 400 (8th Cir. 1962) | 10 |
| Demeretz v. Daniels Motor Freight, Inc., 307 F. 2d 469 (3rd Cir. 1962) | 11 |
| Hanover Trust v. American Airlines, 43 Misc. 2d 856, 251 N. Y. S. 2d 517 (1964) | 6 |
| Laird v. Air Carrier Engine Service, Inc., 263 F. 2d 948 (5th Cir. 1959) | 12 |
| Mertens v. Flying Tiger Line, Inc., 341 F. 2d 851 (2d Cir. 1965), cert. denied, 382 U. S. 816 | 1, 2 |
| Payne v. S. S. Nabob, et al., 302 F. 2d 803 (3rd Cir. 1962), cert. denied, 371 U. S. 870 | 7 |


## RULES AND AUTHORITIES CITED.


| | Page |
|---|---|
| 2A Moore's Federal Practice, ¶ 7.05, pp. 1542-3 (2d Ed. 1967) | 10 |
| 6A Moore's Federal Practice, ¶ 59.11, pp. 3872-73 (2d Ed. 1966) | 10 |
| Fed. Rules Civ. Proc.: | |
| #1 | 9 |
| #7(b)(1) | 10 |
| #16 | 5 |
| #59(d) | 10 |
| #61 | 9 |

## The Solicitor General Has Reached a Wrong Recommendation.

The Solicitor General concludes that "this record does not fairly raise the issues presented in *Lisi*" (his memorandum, page 12). Why, then, should there be further delay of this overly-protracted case? Is not the unusual consideration this court has already given the case due to petitioners' representation (hotly disputed by respondent) that *Lisi* and this case present the same issues?

The Solicitor General's analysis of the record [1] should have led him to the quite obvious conclusion that there is nothing for this court to review, certainly nothing of fundamental importance. Although in his view the Court of Appeals "misread the Warsaw Convention" (his memorandum, page 6),[2] he nevertheless believes that the judgment in the case was correct unless the Berguido ticket was not "adequate under Article 3" (his memorandum, pages 6 and 10).

Whether a ticket is "not adequate" and whether the passenger had an opportunity to take protective measures are fact questions to be resolved by the fact finder under all the evidence. See *Mertens v. Flying Tiger Line, Inc.*, 341

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1. We assume that many of his references to "the record" are to "the papers available to us" (his memorandum, pages 10-11) which must fall far short of the entire record of the case. All references made in our brief are documented to the record (which include the pre-trial proceedings). If the Court grants certiorari, it will find on review of the entire record that it fully supports our factual assertions.

2. We respectfully submit that he has misread the opinion of the Court of Appeals. He did not comment on our view that the court did not purport to "read" the Convention; the judges simply passed on the argument petitioners presented (our brief, pages 13-19).

F. 2d 851, 857 (2d Cir. 1965), *cert. denied*, 382 U. S. 816. The Solicitor General agrees:

> "Petitioners' right to recover damages in an amount unlimited by the Convention depends upon a *factual* showing that Eastern accepted Mr. Berguido as a passenger without giving him a ticket that was adequate under Article 3" (his memorandum, page 10, emphasis his).
>
> * * *
>
> "Consequently, *if a claimant proves* that a carrier has defaulted on its Article 3 obligations, the carrier can be held liable for actual damages . . ." (his memorandum, page 9, emphasis supplied).

The Solicitor General also concludes:

> ". . . the present state of the record provides an insufficient basis for determining whether Eastern failed to deliver an adequate ticket . . ." (his memorandum, page 11).

That is another way of saying that "the claimants" did *not* prove the *facts* necessary to present the legal question they want this court to decide. So what possible justification is there for this court's doing anything with the case other than denying the petition for review?

Petitioners understand the dilemma the record creates for them, and in their recent memorandum they try to improve on it. They tell this court, contrary to what the Court of Appeals said and contrary to what the Solicitor General said (his memorandum, page 11), that the Berguido ticket *was* in evidence. They are mis-stating the record. *Copies* of the flight coupons were in evidence. Copies do not recreate size, readability, contrasting color, etc. (and that is what *Lisi* and the Solicitor General are talking about

when they use the phrase an "adequate ticket"). *A factual* decision on those matters was *not* made below and *could not* have been made. The issues framed at pre-trial excluded *those* fact issues, and at trial there was no evidence specifically directed to them. Neither the original ticket nor evidence describing it was introduced. Furthermore, the copies of the coupons which are in the record (4b-8b) show on their face (upper left-hand corner) that they are but part of a whole. Each of the coupons states that it is issued "subject to the conditions of contract on page 2." Plaintiffs did not introduce page 2, and it is not in this record. So the Solicitor General is quite right when he says that the adequacy of the ticket cannot be determined on the trial record.[3]

Petitioners themselves admit that they never raised this "ticket issue" until the case was on appeal (their recent memorandum, page 4). Their candor is admirable. Of course, they were not so candid with the Court of Appeals or that court would have had no reason even to mention Article 3 of the Warsaw Convention (see respondent's brief, pages 13-19). It simply would have affirmed the trial judge's findings as it did. The Solicitor General does not think that that aspect of the case warrants review by this court (his memorandum, page 13, footnote 14).

**With Respect to Carlos Berguido's Experience as an International Lawyer the Solictor General Was Misled by Petitioner's Failure to File the Record Required by This Court's Rules.**

Under the rules which were applicable when the Petition for Certiorari was filed, petitioners were required to file the record with this court and notify respondent of the

3. On the whole record the ticket was adequate. The parties agreed to that (our brief, page 9).

contents [Rule 21(2)]. Petitioners' notification is appended to this memorandum. We were told that the "Court Proceedings" and one copy of "the record" were filed. Apparently petitioners did not file the proceedings but filed only the portion that suited them. We say that because of the Solicitor General's comment that the facts stated in footnote 9, pages 12-13 of Respondent's Brief in Opposition, are "not a matter of record" (his memorandum, page 11). Footnote 9 is fully documented. Every item but one is taken from the testimony of Frank Truscott, Esquire, at the 1964 trial before Chief Judge Clary. As part of the evidence in the current trial, instead of recalling Mr. Truscott as a witness, it was agreed that Judge Boldt should consider the testimony given in the earlier trial. He did just that (1087a):

> "The Court: Let the record show that in the weekend interval the Court has read in chambers carefully, in detail and totally, the following: . . . Mr. Truscott's testimony in total as recorded in the transcript of the last trial."

One item mentioned in the footnote, that Mr. Berguido purchased flight insurance at the airport, was not in Mr. Truscott's testimony but was made, also by Mr. Truscott, at a pre-trial hearing. That too is in "the record".

If the Solicitor General did not have these matters to review, it must have been solely because these "court proceedings" were not filed with this court. It is not right for petitioners to notify respondent that the "Court Proceedings" were filed when only part of them were. It is not right for petitioners to tell this court that matter they failed to file is "admittedly not of record" (petitioners' recent memorandum, page 5). It most certainly is of record. If it is not with this court, it is solely because petitioners did not file it as they notified respondent they did.

**With Respect to "Waiver" the Solicitor General Has Not Examined the Record Carefully.**

The Solicitor General says that he could not resolve on the basis of the papers made available to him whether plaintiffs "waived" the "ticket issue" in the District Court (his memorandum, pages 10-11). We presume that the Solicitor General at least had the printed appendices in the most recent appeal in the Court of Appeals. In the pre-trial proceedings (Volume 1 of appellant's appendix) plaintiffs were given the opportunity to raise this issue but did not do so. Hence neither affirmative evidence on their part to show inadequacy of the ticket nor evidence by defendant to demonstrate that Berguido in fact took protective measures was introduced. Here is what the record shows:

At a pre-trial conference Judge Boldt, with the agreement of counsel (57a), narrowed the issues to those presented by Chief Judge Clary to the jury in the 1961 trial (see Fed. Rules Civ. Proc. #16, ". . . such order . . . controls the subsequent course of the action . . .").

> ". . . the charge in the first trial . . . should be a starting point . . . If either of you desire anything other than as in the first charge *or in addition to the first charge* or whatever, please make your requests. You will not have to request anything that is in the first charge, so that it will narrow down what you have to request" (56a, emphasis supplied).
>
> • • •
>
> "As far as I am concerned, I am starting with the first trial charge, and then if either of you wish to request something different, request it, and I will consider it (56a).
>
> • • •

"I am cautioning all of you . . . I am starting with the first charge, but I will consider any requests to modify, deviate, add or anything like that" (57a).

* * *

". . . absent a request for a charge or anything like that, everything in the first charge, including wilful misconduct, will be deemed to be agreed to. Is that clear?

Mr. Richter: Yes, sir." (57a)

* * *

"You have got to call the judge's attention to a point if you expect him to make a ruling" (68a).

In 1961 Chief Judge Clary charged the jury that the Warsaw Convention governed and that the liability limitation of $8,300 was applicable unless plaintiff proved wilful misconduct (13b-15b). The "ticket issue" was not part of the charge.[4] Plaintiff's counsel did raise one new issue about the applicability of the Convention itself, and defendant called for an offer of proof (70a-71a). Plaintiff offered to prove that because a domestic and not an international tax was charged on the Berguido tickets (76a), Warsaw was inapplicable, under a 1964 New York Supreme Court decision, *Hanover Trust v. American Airlines*, 43 Misc. 2d 856, 251 N. Y. S. 2d 517 (1964) (74a). The offer was made in furtherance of Judge Boldt's view (81a):

"The Federal Rules of Civil Procedure contemplate the fullest disclosure to avoid surprise or entrapment. They devolve the broadest powers and discretion in the trial judge to see to it that the proceedings are run according to what he deems necessary for a fair trial."

4. This was also true of the 1964 charge to the jury, and plaintiffs took no exception to the charge in that respect (Record Document #190).

That is the established law:

> "It has long been the law that attorneys at the pretrial stage 'owe a duty to the court and opposing counsel to make a full and fair disclosure of their views as to what the real issues at the trial will be.'. . . It is through such disclosure at pretrial that trial prejudice can be avoided." *Payne v. S. S. Nabob, et al.*, 302 F. 2d 803, 807 (3rd Cir. 1962), *cert. denied*, 371 U. S. 870.

Over the weekend the parties had a chance to check the law and the facts on plaintiff's new theory. Plaintiff's counsel withdrew it (117a):

> "We are candid to admit that the theory that we proposed with respect to the Warsaw Convention when we met with Your Honor is not a valid theory because of the tax laws, and we withdraw that theory."

They then said they wanted "to preserve our position with respect to the Warsaw Convention in that we do not agree that this case is governed by the Warsaw Convention . . ." Judge Boldt asked specifically whether their contentions in that respect "are substantially as stated" in their memorandum of May 22, 1961 (117a).

> "Mr. Lord: That is correct, Your Honor."

The memorandum referred to raises only the question whether Mr. Berguido's flight was international in character as defined by the Convention (9b-12b). It does not claim that the Convention's liability limitations are inapplicable because of delivery of an inadequate ticket.[5]

Judge Boldt asked specifically whether plaintiffs wished to open up any new issue or to present any new proof with

5. When plaintiff's memorandum is read in conjunction with defendant's memorandum of the same date (Record Document 85), there is not only "waiver" but affirmative agreement that the ticket satisfied Article 3 of the Convention (our brief, page 9).

respect to their contentions about the Warsaw Convention and they said they did not (118a).

> "The Court: Yes. You have had a memorandum which you have put in at the beginning of the first trial, as I recall. It is filed here under file date of May 22, 1961, in which you raised an issue as to the applicability of the Warsaw Convention. I would assume that your contentions with respect to it are substantially as stated in that memorandum.
>
> "Mr. Lord: That is correct, Your Honor.
>
> "The Court: All right. But you do not now propose to offer any further proof or ask for a re-opening for that purpose?
>
> "Mr. Lord: That is correct, Your Honor."

**The Solicitor General's Recommended Procedure.**

1. *The Recommendation Is Contrary to Substantial Justice.*

The Solicitor General's recommendation, that this court duck what issues there are in this case to see if they don't disappear when this court decides *Lisi,* is most unsatisfactory. That is all very well if *Lisi* is reversed. But what if *Lisi* is affirmed? The recommended course, if followed, would lead at the very least to further hearings in the Court of Appeals. And whatever the procedures below, the judgment must stay as it is unless there are new facts found. They could not be found plaintiffs' way unless there were at least a partial new trial. So we see this recommendation as possibly contemplating a sixth trial with entirely new fact issues.[6]

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6. Compare this possibility with the trial judge's view (31a): ". . . this litigation has been very long and protracted. The accident happened in December of 1955, and here we are in September of 1964, and we have a case of this kind. We are now starting the fifth trial, and it just isn't a very happy situa-

The new issues could be: what was the "irregularity", if any, in Carlos Berguido's ticket? Did it mislead him? Did he fail to take protective measures such as purchasing flight insurance, etc.? Who's to decide these matters, judge or jury? Is there to be an entirely new round of interrogatories, depositions and requests for admissions, new pleadings and new motions? Should Pan American, the issuer of the ticket in question, be joined as a third-party defendant for breach of an implied warranty to print understandable tickets or for the failure of their ticket clerk to explain the significance of the Warsaw Convention to a Philadelphia lawyer?

To suggest in this eleven-year-old case that the litigation whirl, finally ended after two full and fair trials, should be set spinning once again because of the sheer accident that some other plaintiffs, who presented a different set of fact issues to a different court, might make out better, is, we submit, basically and fundamentally unjust. Federal procedure is supposed to be "speedy and inexpensive" (Fed. Rules Civ. Proc. #1). "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." (Fed. Rules Civ. Proc #61). That's the theory. The Solicitor General is not applying the theory. On the contrary (perhaps because he was not given the complete record) he is proposing delay and expense. And

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tion. I am not claiming that it is anybody's fault. I merely say that if all litigation in the nation had a history such as this somebody would take the responsibility for the administration of justice out of our hands and put it some place else.

Now, these things do happen. When I was a lawyer I was in cases that had to be tried multiple times. But it is a bad thing, and I want to make every possible effort I can to make this the one final shot and to put it in such a posture that if there is a review on what happens here, wherever it goes from here, they can settle it at some time or other without the necessity at least of another session in a trial court."

all the delay and all the expense will be for nothing unless, after the appellate procedures are finally completed, a new trial is ordered and then at the very least (1) petitioners' counsel are allowed to withdraw their pre-trial agreement that the ticket complied with Article 3, (2) the sworn testimony about Mr. Berguido's experience as an international lawyer is changed, and (3) somehow it is explained to the satisfaction of the fact finder that Mr. Truscott, a counsel of record for petitioners at all trials, was wrong when he told the court and assembled lawyers that Mr. Berguido purchased flight insurance. Does "substantial justice" (Fed. Rules Civ. Proc. #61) permit remand for that?

### 2. *The Recommendation Requires the Exercise of Jurisdiction Which Does Not Exist.*

There is a serious question whether there is even *jurisdiction* to do what the Solicitor General suggests. No specific reference to this "ticket issue" was made in the motion for new trial (the motion and exceptions incorporated in it are appended). The general "catch-alls" in the motion do not satisfy the requirement that motions "shall state with particularity the grounds therefor" [Fed. Rules Civ. Proc. #7(b)(1)]; 2A MOORE'S FEDERAL PRACTICE, ¶ 7.05, pp. 1542-3 (2d Ed. 1967); *Chicago & Northwestern Ry. Co. v. Britten,* 301 F. 2d 400 (8th Cir. 1962). Under the Federal Rules in existence at the time [the July 1966 amendments provide for a different procedure—Fed. Rules Civ. Proc. #59(d)] according to the "overwhelming weight of authority" a trial court lacked power to grant a new trial on its own initiative more than ten days after judgment. 6A MOORE'S FEDERAL PRACTICE, ¶ 59.11, pp. 3872-73 (2d Ed. 1966). So in this case the power, i.e., the jurisdiction, to alter the judgment on grounds not stated in the motion

for new trial had expired by October 20, 1964 (the judgment was entered October 9). The appeal was not taken until November 10, 1964, and jurisdiction of the Court of Appeals can be no broader than that of the District Court as of the time the appeal was taken.

> "Nothing happened after [October 20th] which could restore or recreate judicial power, with respect to granting a new trial under Rule 59, that had already expired." *Demeretz v. Daniels Motor Freight, Inc.*, 307 F. 2d 469, 473 (3rd Cir. 1962).

The jurisdiction of this court is merely to review decisions legitimately within the scope of the jurisdiction of the Court of Appeals. So where is there any *jurisdiction* to order a new trial on the "ticket issue"? It was not timely raised.

### 3. *The Recommendation Is Non-Judicial.*

The Solicitor General's recommendation is the antithesis of the judicial process. Cases tried and disposed of are *not* to be reversed on appeal unless there is error. What was the *error* in the proceedings in the trial court? That's the issue. The Solicitor General does not suggest that Judge Boldt committed error. The petitioners do not suggest that Judge Boldt failed to conduct a trial within the framework of his pre-trial order. And the Solicitor General thinks it plain (his memorandum, page 13, footnote 14) that certiorari would not be justified to review the findings that Judge Boldt made.

Justice should be even handed. Excess underwriters in Great Britain (43a) are no less entitled to rely upon the integrity of the American judicial process than is the estate of a Philadelphia lawyer. Through every step of

the litigation process clients evaluate their position and decide how to proceed relying on advice from their counsel. Fair advice is impossible if counsel cannot rely on *the* fundamental fact of litigation life, that the case will be decided on the record. For these purposes the record is not merely the trial record; it necessarily includes pre-trial agreements about underlying facts.

> "An attorney has wide authority in the conduct of litigation. He is chosen to speak for the client in Court. When he speaks in Court, whether it be in a formal trial *or in an informal pre-trial,* he speaks for and as the client. Those statements or agreements which dispense with proof of facts are made with respect to the impending trial and until withdrawn are not merely evidence as in the case of an ordinary admission. *They are absolutely binding.* As long as they stand, they foreclose the matter altogether. See, generally as to admissions by attorneys, *McCormick, Evidence* § 244 at 520 (1954); *Restatement, Agency* §§ 284-291 (1933); *Am. Jur., Attorneys at Law* §§ 67, 68, 85 (1936); *Am. Jur. Evidence* § 592 (1939); 97 A. L. R. 374." *Laird v. Air Carrier Engine Service, Inc.,* 263 F. 2d 948, 953 (5th Cir. 1959). (Emphasis supplied.)

The judicial process which ignores its fundamental tool, the record, is not due process.

As between the Solicitor General's vague recommendation and the prospect of this court's reviewing the entire record below, we would prefer the latter. Then at least we will have the opportunity to demonstrate to this court that there was no error in Judge Boldt's handling of this case and no reason for Chief Judge Clary's arbitrary reversal

of the 1964 jury verdict in Eastern's favor. *On the record* our clients are right and the petitioners are wrong. So our clients would prefer review of *this record* to the possibility—however remote—that they will be subjected to the uncertainties inherent in litigating in 1968 or 1969 issues not heretofore explored concerning 1955 conduct.

We submit, however, that this court has a preliminary question to answer about *the record* petitioners have presented here. Where in the petition for certiorari or in the supporting papers is it demonstrated that at the trial level the petitioners established *the facts* upon which they predicate the legal argument they now advance? The Solicitor General says those facts were not established. No court below said they were. We assure the court that they were not. The petition should be denied.

**Suggested Alternative Disposition.**

Unfortunately the opinion of the Court of Appeals has created some confusion. The Solicitor General's reading of the opinion demonstrates that. As we understand it no one in this litigation now contends, as petitioners did in the Court of Appeals, that, under the Warsaw Convention, if a plaintiff proves non-delivery of a ticket,[7] he must then prove carrier negligence. If people are going to read the opinion of the Court of Appeals that way, they may be misled. This court, although there is hardly a case or controversy before it, might consider it wise to cure that problem. If the court agrees with the Solicitor General, that review of Judge Boldt's findings as affirmed by the Court of Appeals is unwarranted, then to correct the Court of Appeals' "misreading" of the Convention requires no more than an order along the following lines:

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7. In this case *a* ticket was delivered (see requests for admissions appended to petitioners' most recent memorandum). The "ticket issue" in this case, such as it is, is over "adequacy" not over "delivery."

"Certiorari is granted. The decision of the Court of Appeals is reversed. The judgment is affirmed on the opinion of Judge Boldt."

Respectfully submitted,

OWEN B. RHOADS,
F. HASTINGS GRIFFIN, JR.,
DECHERT, PRICE & RHOADS,
*Attorneys for Respondent.*

*Of Counsel:*

DANIEL L. STONEBRIDGE,
JOHN J. MARTIN.

# Appendix.

## NOTIFICATION OF CONTENTS OF RECORD.

*To F. Hastings Griffin, Counsel for Respondent:*

YOU ARE HEREBY NOTIFIED that the petition for writ of certiorari in the above-entitled and numbered case was filed in the Supreme Court of the United States on the 22nd day of August, 1967.

The record filed pursuant to the requirement of Rule 21(1) consists of:

Petition for writ of certiorari; Petitioner's Appendix; Opinion and judgment of Court of Appeals for the Third Circuit; Docket entries and Court Proceedings.

(If the record was printed for the use of the court below, state here whether you have or have not filed nine copies as permitted by Rule 21(4).)

One certified copy of the record has been filed with the Supreme Court.

B. NATHANIEL RICHTER,
*Counsel for Petitioner.*

## PLAINTIFFS' MOTION TO SET ASIDE VERDICT.

Plaintiff, Marion J. Berguido, individually, Marion J. Berguido, Robert G. Rowe and Warren H. Woodring, Executors of the Estate of Carlos Berguido, Jr., and June Berguido, Joy Berguido, Jill Berguido and Carlos Berguido, III, by their guardian Marion J. Berguido, moves this Court to set aside the verdict for the plaintiff in the amount of $8300 and the judgment entered thereon, and to enter judgment for the plaintiffs in the amount of $375,000 in accordance with plaintiffs' Motion for Judgment on the whole record and the trial judge's finding of damages sustained by the plaintiff Marion J. Berguido.

In the alternative, plaintiff Marion J. Berguido, individually, Marion J. Berguido, Robert G. Rowe and Warren H. Woodring, Executors of the Estate of Carlos Berguido, Jr., and June Berguido, Joy Berguido, Jill Berguido and Carlos Berguido, III, by their guardian Marion J. Berguido, moves this Court to set aside the verdict for the plaintiff in the amount of $8300 and the judgment entered thereon and to grant a new trial on the grounds stated as follows:

1. The verdict and judgment in the amount of $8300 is against the law.

2. The verdict and judgment in the amount of $8300 is against the evidence.

3. The verdict and judgment in the amount of $8300 is against the weight of the evidence.

4. The verdict and judgment in the amount of $8300 was clearly erroneous.

5. The verdict and judgment in the amount of $8300 was made pursuant to erroneous conclusions and views of the law by the trial judge.

6. The verdict and judgment in the amount of $8300 was made on the basis of insufficient evidence.

7. The verdict and judgment in the amount of $8300 was a result of a mistake made by the trial judge upon reviewing the entire evidence.

8. The verdict and judgment in the amount of $8300 was made upon findings of fact induced by erroneous views and conclusions of law.

9. The verdict and judgment in the amount of $8300 was a miscarriage of justice and a new trial should be granted in furtherance of the interest of justice.

10. The verdict and judgment in the amount of $8300 was clearly erroneous as pointed out in plaintiffs' Exceptions to Findings of Fact.

Respectfully submitted,

RICHTER, LORD, TOLL & CAVANAUGH,

and

F. F. TRUSCOTT,

By ARTHUR G. RAYNES,

*Counsel for Plaintiffs.*

## EXCEPTIONS TO FINDINGS OF FACT.

AND Now, to wit, this day of 1964, plaintiff herewith finds exceptions to each and every finding of fact rendered by the learned trial judge in each and every conclusion of law, under Rule 52(a) as follows:

1. Plaintiff takes exception to the trial judge's finding that ". . . there is not a preponderance of credible evidence that a health condition of either pilot or misrepresentation, if any, relating thereto, constituted willful misconduct causing or contributing to the crash of Flight 642."

2. Plaintiff takes exception to the trial judge's finding that ". . . there is not a preponderance of credible evidence showing a substantial or reasonable probability that the flight 642 crew, or any of them, under other than emergency conditions knowingly and intentionally brought the plane to a position below the minimums prescribed for an ILS approach, or knowingly and intentionally violated any other regulation for or requirement of a proper ILS approach."

3. Plaintiff takes exception to the trial judge's finding that ". . . there is substantial and reasonable probability shown by a preponderance of the evidence that the presence of jet aircraft in or near the ILS glide slope for Runway 5 and in or near the immediate pathway of the landing approach of Flight 642 threatened or interfered with the approach of Flight 642, bringing about emergency conditions and accident resulting in the crash without willful misconduct, negligence or fault on the part of defendant or any member of the crew of Flight 642."

4. Plaintiff takes exception to the trial judge's finding that ". . . the actual cause of the crash of Flight 642

cannot be determined on the record before me and I find willful misconduct as a cause of the accident to be no more than one possibility, among others."

5. Plaintiff takes exception to the trial judge's finding that ". . . willful misconduct, in my judgment, is far less probable as a cause of the crash than the highly probable presence and actions of jet aircraft in or near the ILS approach path of Flight 642."

6. Plaintiff takes exception to the trial judge's finding that ". . . there is substantial probability that one or more jet aircraft were in or near the immediate vicinity of the ILS glide slope leading to Runway 5 during the landing approach of Flight 642 within a very short period of time prior to the plane crash."

7. Plaintiff takes exception to the trial judge's finding that ". . . affirmative testimony as to seeing objects and hearing sounds, when unequivocal, reasonable and ringing true to the trier of fact is far more persuasive and convincing than testimony that said sights or sounds were not seen or heard by other witnesses having opportunity and occasion to see and hear."

8. Plaintiff takes exception to the trial judge's finding that ". . . I do not find as proven by a preponderance of the evidence all of the assumed facts stated in the hypothetical questions put to Kepner, Glickstein and Cann."

9. Plaintiff takes exception to the trial judge's finding that the opinion of Glickstein, Kepner and Cann were incredible and unacceptable in various important and decisive particulars.

10. Plaintiff takes exception to the trial judge's findings as to all other facts contained in his comment on coun-

sel's argument to the Court and the opinion of the Court which show that the findings were clearly erroneous.

11. Plaintiff takes exception to the trial judge's findings of fact which were made pursuant to erroneous conclusions and views of the law.

12. Plaintiff takes exception to the trial judge's findings of fact which were made on the basis of insufficient evidence.

13. Plaintiff takes exception to the trial judge's findings of fact, conclusions of law and verdict because it is clear upon reviewing the entire evidence that a mistake was committed.

14. Plaintiff takes exception to the trial judge's verdict since it was against the clear weight of the evidence.

15. Plaintiff takes exception to the trial judge's verdict because there was no substantial evidence to sustain the verdict as found by the Court.

16. Plaintiff takes exception to the trial judge's verdict because it was induced by an erroneous view of the law.

Respectfully submitted,

RICHTER, LORD, TOLL & CAVANAUGH,

and

F. F. TRUSCOTT,

By ARTHUR G. RAYNES,

*Counsel for Plaintiffs.*

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JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

October Term, 1967.

## No. 528.

MARION J. BERGUIDO, Individually, MARION J. BERGUIDO, ROBERT G. ROWE and WARREN H. WOODRING, Executors of the Estate of CARLOS BERGUIDO, JR., and JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO and CARLOS BERGUIDO, 3rd, by Their Guardian, MARION J. BERGUIDO,

*Petitioners,*

*v.*

EASTERN AIRLINES, INCORPORATED,

*Respondent.*

# PETITIONERS' SUPPLEMENTAL BRIEF.

B. NATHANIEL RICHTER,
CHARLES A. LORD,
ARTHUR G. RAYNES,
121 S. Broad Street,
Philadelphia, Pennsylvania,
*Attorneys for Petitioners.*

*Of Counsel:*
SEYMOUR I. TOLL.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

In aid of the Court's consideration of the Petition for Certiorari in the above-captioned matter, petitioner submits herewith "Warsaw Convention-Limited Liability Avoidance" which is reprinted verbatim from *33 Journal of Air Law and Commerce 478.*

## "WARSAW CONVENTION—LIMITED LIABILITY—AVOIDANCE.

A wrongful death action was instituted against Eastern Air Lines, Inc. for death resulting from the fatal crash of an Eastern Air Lines Constellation in Florida on December 21, 1955. Eastern alleged that its liability was limited under the Warsaw Convention.[1] The plaintiff, attempting to recover damages *in excess* of the Warsaw limitation,[2] alleged in the alternative that (1) the carrier was guilty of wilful misconduct or, (2) that the carrier failed to make sufficient delivery of a ticket[3] under the Convention. In the lower court Eastern conceded that it could not maintain its burden of proof to show that it was without fault.[4] However, the

1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, 12 Oct. 1929, 49 Stat. 3000 (1929). T. S. 876 (1934). The Hague Protocol, to which the United States is not a party, was adopted in 1955; it was a partial revision of the Convention, *e.g.*, it increased the limit of liability from $8300 to $16,600. The United States Supplemental Agreement which went into effect May, 1966 is another attempt to increase the limit of liability. It is based on agreements between carriers, which limit liability to $75,000.00 in some instances and $58,000 in others.

2. Article 22(1) of the Convention provides: 'In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. . . .' ($8921.87).

3. Article 3(1) of the Convention provides: 'In respect to the carriage of passengers a ticket shall be delivered containing: (c) a notice to the effect that . . . the Warsaw Convention may be applicable. . . .' Article 3(2) provides: 'The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with consent of the carrier, the passenger embarks without a passenger ticket having been delivered . . . the carrier shall not be entitled to avail himself of the provisions of Article 22.'

4. Article 20(1) of the Convention provides: 'The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him and them to take such measures.'

court found that Eastern was neither negligent nor guilty of wilful misconduct. But the trial [5] without jury resulted in an award to plaintiff of the $8300.00 limitation. *Held: Affirmed.* The issues of wilful misconduct and negligence were *bound together* in this case and the *burden of proving both* rested with the plaintiff; as plaintiff had not carried his burden of proof, consideration of plaintiff's contentions regarding delivery of the ticket was unnecessary. *Berguido v. Eastern Air Lines, Inc.*, 369 F. 2d 874 (3rd Cir. 1966), *petition for cert. filed*, 36 U.S.L.W. 3107 (Aug. 22, 1967) (No. 528).

Without the Warsaw Convention, there would be numerous conflicts of law problems in action involving international flights.

> The Convention of Warsaw consists of a code which lays down certain conditions of contract for international carriage. It defines and limits the rights of passengers and owners of cargo in such carriage, and the corresponding liabilities of the carrier. [I]t imposes upon the carrier a limited liability in most cases of accident . . . and an unlimited liability in some.[6]

In addition to providing uniformity of laws applicable to international air carriage, the Warsaw Convention provides in Article 22 for the limitation of the financial liability

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5. The trial upon which this appeal is based was the fifth trial of this case at the district court level. The first two, with juries, ended in mistrials. The third trial ended with a jury finding of wilful misconduct on the part of the carrier but was reversed by the appellate court on evidentiary grounds. The fourth trial before a jury ended with a verdict for the plaintiff, without a finding of wilful misconduct, but with a recovery not to exceed the Convention limitation. However, the District Court, upon plaintiff's motion, vacated its judgment and granted a new trial.

6. 1 C. SHAWCROSS & K. BEAUMONT, INTERNATIONAL LAW, 43 (2d ed. 1966).

of the carrier to $8291.87 [hereinafter $8300]. Realizing that the cause of an aircraft accident might never be ascertained, the drafters also set out that a carrier would be presumptively liable when an accident occurred [7] but could rebut the presumption and avoid liability.[8] Additionally, exceptions were drafted into the Convention which provide for *unlimited* carrier liability in cases of either failure to deliver a passenger ticket [9] or wilful misconduct.[10] Thus, a plaintiff who will be satisfied with an $8300 recovery may simply allege injury,[11] but a plaintiff who desires to recover

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7. Article 17 of the Convention provides: 'The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.'

8. Article 20(1) of the Convention quoted in part, *supra* note 4. Under the United States Supplemental Agreement of 1966 the carrier is *absolutely* liable, with a financial liability limit of $75,000, and is not allowed to rebut this presumption of liability. For a discussion of the history which gave rise to this supplemental agreement see *infra* note 27.

9. *See* Article 3(2), *supra* note 3. For a discussion of the history of the drafting of Article 3(2) see, H. DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW, 266-72 (1954).

10. Article 25(1) of the Convention provides: 'The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct.'

11. The Second Circuit applied the Convention in Grey v. American Airlines Inc. In stating that the carrier was absolutely liable under the Convention and recognizing that liability may be avoided through Article 20, the court said,

> As to this it is plain that the burden of proof is on the carrier. And in passing, it may be noted that in most if not all serious accidents, whether or not members of the crew survive, the difficulties in avoiding this presumptive liability would seem to be insurmountable.

Grey v. American Airlines, Inc., 227 F. 2d 282, 285 (2d Cir. 1955) *cert. denied*, 350 U. S. 989 (1956).

*more* than $8300 must do one of three things: (1) successfully invoke Article I(1),[12] which will make the Convention irrelevant to the litigation (thus, the laws of the country in which the action is brought would determine the amount to be recovered); (2) plead wilful misconduct, or (3) plead the carrier's failure to deliver to the passenger a ticket with an adequate notice of liability.[13]

As to the last point, English authorities hold that a carrier failing to deliver a sufficient ticket remains prima facie liable; it is not entitled to the benefits of the Convention but is subject to its liabilities.[14] American cases are unequivocal in holding that without delivery of a sufficient ticket the carrier is *absolutely* liable for the full amount of

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12. Article I(1) of the Convention provides: 'This Convention applies to *all international* carriage of persons, luggage, or goods performed by aircraft for reward. . . .' The reference to 'all international carriage' impliedly excludes carriage which is not international in nature.

13. Delivery of a ticket which fails to give adequate notice of liability results in an insufficient delivery of the ticket.

14. Westminster Bank, Ltd. v. Imperial Airways, Ltd., [1936] 2 All. E. R. 890. This case involved a failure to deliver an air consignment note that listed all the particulars required by the Convention, rather than an inadequate delivery of a passenger ticket, but the statements that outline limited liability and avoidance of liability apply equally to a failure to comply with the ticket requirements and the air consignment note requirements. In giving judgment for the plaintiff the court held that under the Warsaw Convention the carrier is prima facie liable for injuries that occur during the course of transport, that the carrier can avoid this liability through Article 20, *but* that it is absolutely and unlimitedly liable if it fails to deliver an adequate air consignment note. *See also* Philippson v. Imperial Airways, Ltd., [1939] 63 Lloyd's List L. R. 119.

Shawcross and Beaumont note that 'When a carrier has failed to deliver a ticket he will be absolutely liable for the full amount of any damages arising under Articles 17 or 19 . . . . ., and since the carrier is not entitled to avail himself of the provisions of Article 20(1) and probably Article 21 which exclude this liability, nor of those which limit it, he remains subject to his full prima facie liability.' 1 C. SHAWCROSS & K. BEAUMONT, *supra* note 6 at 441.

any damages proven by the plaintiff.[15] In *Lisi v. Alitalia-Linee,*[16] the carrier argued that its liability was limited because it had delivered a ticket, but the court found that the ticket delivery was insufficient because the size of the print made the notice of liability inadequate, and consequently the carrier could not limit its liability nor avail itself of any defense provided by the Convention.[17] Both *Lisi* and *Mertens v. Flying Tiger Airlines, Inc.*[18] discussed delivery of a passenger ticket with adequate notice of liability. In *Mertens* the carrier argued that Article 3(2) merely requires delivery of a passenger ticket,[19] but the court said that Article

15. Lisi v. Alitalia-Linee, 370 F. 2d 508 (2d Cir. 1966), *cert. granted,* 26 U. S. L. W. 3185 (U. S. Nov. 7, 1967) (No. 70); Mertens v. Flying Tiger Line, Inc., 341 F. 2d 851 (2d Cir. 1965), *cert. denied,* 382 U. S. 830, *reh. denied,* 382 U. S. 933 (1965).

16. 370 F. 2d 508 (2d Cir. 1966).

17. *Id.* at 514. In *Mertens* the notice of the carrier's limited liability 'was so printed in such manner as to virtually be unnoticeable and unreadable.' 341 F. 2d at 857. In criticizing the 'Lilliputian print' of the ticket the court held at the same page that 'as a matter of law' the delivery of the ticket was inadequate. *But see* Seth v. British Overseas Airways Corp., 329 F. 2d 302 (1st Cir.), *cert. denied,* 379 U. S. 858 (1964). *Lisi* quoted the *Mertens* decision with approval and reasoned that a condition precedent to the carrier's defense of limited liability is delivery to the passenger of a ticket which gives him notice that his recovery is limited in the event of a crash. 370 F. 2d at 513.

18. 341 F. 2d 851 and 370 F. 2d 508.

19. The carrier maintained that the Article 3(2) requirements are less than those of Article 4(4), which requires that a luggage ticket state all the particulars of the article. This interpretation of the distinction between the articles had been upheld in the *Grey* litigation where the court stated: 'Art. 3(2) merely requires that the ticket be delivered to the passengers and thus clearly differs from Articles 4(4) and 9. I must conclude that this omission or difference is most significant.' Grey v. American Airlines, 95 F. Supp. 756, 758 (S. D. N. Y. 1950). The *Lisi* court distinguished the *Grey* rule that mere ticket delivery is sufficient by saying that the ticket issued in *Grey* involved the failure of the carrier to list a stopping place. 'As the failure to list such a stopping place did not change the international character of the flight, the passenger was not deprived of a reasonable opportunity to take self-protective measures.' Therefore, the ticket had been delivered. 370 F. 2d at 513.

3(2) requires a delivery of a ticket that will afford the passenger a reasonable opportunity to take some self-protective measures.[20] The court reasoned that otherwise there would have been no reason for the Convention (1) to require that the ticket state the limited liability of the carrier, (2) to require that the ticket be delivered to the passenger, and (3) then further to provide for a higher limit of liability if the carrier and passenger so agree.[21]

Once a court determines that Article 25 or Article 3(2) applies, the burden of proving inadequate delivery of a ticket or wilful misconduct then becomes crucial. Some writers think that the 'quid pro quo' for the Convention's absolute but limited recovery is the shift of the burden of proof to the carrier.[22] Thus, if the plaintiff seeks an amount *above* the Convention limit, the burden lies with him to establish the necessary elements of Articles 25 or Article 3(2). If wilful misconduct is at issue the plaintiff must bear the burden of proof.[23] If the plaintiff alleges inadequate ticket delivery, the *Mertens* court said, indirectly, that the plaintiff must prove non-delivery of a ticket or delivery of an insufficient ticket: 'The jury decided that plaintiff had failed to prove . . . that no ticket was ever delivered to the decedent.'[24] A plaintiff, then, has the burden of proving inadequate ticket delivery just as he must prove

20. 341 F. 2d at 856.

21. *Id.* at 857.

22. *See* H. DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW, 12, 18-26 (1954).

23. Grey v. American Airlines, Inc., 227 F. 2d 282, 285 (2d Cir. 1955). Shawcross and Beaumont, in their discussion of the loss of the carrier's protection due to wilful misconduct suggest that, 'The burden of proving that the carrier has lost its protection is presumably on the plaintiff." 1 C. SHAWCROSS & K. BEAUMONT, *supra* note 6 at 456.

24. 341 F. 2d at 856. Notwithstanding this jury finding, the court found the ticket inadequate as a matter of law.

wilful misconduct. The rationale is that when a plaintiff seeks more than the $8300 limitation of liability, he must bear the burden of proving his cause for avoiding the limitation. It is clear that when a plaintiff alleges inadequate ticket delivery, even in conjunction with wilful misconduct, he is required to prove *only one* of these two allegations.[25]

Under the Convention, unless the carrier proves the contrary, it is presumed to be negligent. Hence the unusual decision in *Berguido,* the first case to adjudge a carrier non-negligent without the carrier's proving that it was without fault. Indeed, in *Berguido,* the carrier *admitted* that it could not prove its lack of negligence. The court then went further and *placed the burden of proving negligence on the plaintiff* because he sought to recover on the ground of inadequate ticket delivery as well as wilful misconduct.[26] In this the court erred because the plaintiff always has available the presumption of liability set out in Article 17: if the plaintiff pleads wilful misconduct and fails to prove it, he should be entitled to have judgment entered in his favor on the negligence issue unless the carrier rebuts the presumption of fault.

*Mertens* is in stark contrast to *Berguido* on this issue because in *Mertens* the issues of wilful misconduct and inadequate ticket delivery were raised and, although the plain-

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25. The ticket problem was ruled out as an issue during the pre-trial hearing. For this reason, the plaintiff, even though he had a valid point, was foreclosed from ever raising the issue again. Also, the plaintiff himself assumed that without a valid ticket the Convention rule of presumed negligence did not apply, that the litigation was outside the Convention, and that he had to prove negligence. It was only on petition for re-hearing that the plaintiff first recognized his mistake. Article 3(2) plainly states that even with an inadequate ticket delivery the contract of carriage is still under the rules of the Convention.

26. The court apparently reached its decision on the theory that the scheme of the Convention does not support unlimited liability.

tiff failed to prove wilful misconduct, the ticket was inadequate and he was allowed a new trial on the issue of damages alone. *Mertens* clearly implies that negligence and wilful misconduct *are not* bound together and that the plaintiff should *never* have to prove negligence under the Convention. Stated another way, the plaintiff only has to prove facts that will *increase* liability.

In conclusion, an award of *any* amount with a specific finding that the carrier was without fault is inconsistent and impossible under the Warsaw Convention. Unless the carrier affirmatively shows that it was without fault, the plaintiff is entitled to the limited award with an unlimited award always an existing possibility. The articles of the Convention are of equal weight; hence, the articles providing for absolute but limited liability cannot be interpreted so as to exclude or overrule the article providing for unlimited recovery.

As an aside to the *Berguido* issues, one can predict that the *Lisi* decision holding that a ticket must effectively warn the passenger that his recovery is limited in order to be validly delivered is, in all probability, going to be a bitter pill for the airlines. Either the carriers will have to show in boldface print the limitation of liability (with all its attendant psychological effects) or the courts are going to take this perfect avenue to avoid a limitation that has become the source of extreme discontent within the United States.[27]

*Joan T. Winn*

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27. On 15 November 1965 the United States sent a Notice of Denunciation to the Polish Government stating that this country opposed the Convention's low limits on liability for personal injuries, and would withdraw from the Convention at the end of six months. On 14 May 1966 the United States withdrew this notice. For a discussion of the subject see *The Warsaw Convention—Recent Developments and the Withdrawal of the United States Denunciation*, 32 J. Air L. & Com. 243 (1966)."

Respectfully submited,

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IN THE

# Supreme Court of the United States

October Term, 1967.

## No. 528.

MARION J. BERGUIDO, Individually, MARION J. BERGUIDO, ROBERT G. ROWE and WARREN H. WOODRING, Executors of the Estate of CARLOS BERGUIDO, JR., and JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO and CARLOS BERGUIDO, 3rd, by Their Guardian, MARION J. BERGUIDO,

*Petitioners,*

*v.*

EASTERN AIRLINES, INCORPORATED,

*Respondent.*

## PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI.

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## I.

## STATEMENT.

In 1955 petitioners' decedent purchased round trip air passage from Philadelphia to San Salvador and return. All parties agree that his flight was governed by the Warsaw Convention. His air ticket contained only the following illegibly printed, reference to the Warsaw Convention:

> "Carriage/Transportation under this Passenger Ticket and Baggage Check hereinafter called 'ticket' is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules Relating to International Carriage/Transportation by Air signed at Warsaw October 12, 1929, if such carriage/transportation is 'international carriage/transportation' as defined by said Convention."[1]

The last and fatal leg of his round trip was made on a flight originating in Miami and destined for Philadelphia. The plane crashed at the airport in Jacksonville, Florida, killing decedent and all others on board. After an extraordinary history of litigation in which a jury originally and justifiably concluded that the plane crashed as the result of a deliberate attempt to land under a fog in violation of Federal flight regulations, a 2-1 decision in the Court of Appeals for the Third Circuit eventually affirmed a judgment in favor of respondent air line.

A Petition for a Writ of Certiorari was filed, October Term 1967, No. 528, to review the judgment below. On March 25, 1968, that Petition was denied under circumstances and with consequences which, we respectfully submit, warrant the grant of this Petition.

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1. Despite respondent's suggestions to the contrary, the tickets —which appear as Appendix B to the Petition for Certiorari—appear in the record. Respondent offered them into evidence and described them accurately as "the tickets" (760a-762a of the trial record).

## II.

## THIS COURT'S REFUSAL TO GRANT CERTIORARI CLEARLY AND ERRONEOUSLY RESULTED FROM THE 4-4 VOTE IN ALITALIA-LINEE AEREE ITALIANE, S. P. A. v. LISI, ET AL.

### A. A Grant of Certiorari Could Not Result in Affirming the Judgment of the Court of Appeals for the Third Circuit Even if This Court Remained Evenly Split Because the Court of Appeals Refused to Decide the Crucial Ticket Issue.

On March 25, 1968, this Court affirmed *Alitalia-Linee Aeree Italiane, S. P. A. v. Lisi*, October Term 1967, No. 70, by an equally divided court. Mr. Justice Marshall did not participate. As Solicitor General, he was on the Memorandum for the United States as *Amicus Curiae* in that case. On the same day that *Lisi* was decided here, the case at bar was denied certiorari. Mr. Justice Marshall did not participate in our case either. In view of Solicitor General Griswold's earlier suggestion that this case should abide the outcome in *Lisi*, and in view of the simultaneity of decisions in both cases here, it is clear that this Court recognized that the two cases share a common and decisive question, the Warsaw ticket issue.

Because of Mr. Justice Marshall's abstention in *Lisi*, there was an evenly split vote on *Lisi's* merits. The equal division had the effect of affirming the decision of the Court of Appeals for the Second Circuit, a decision which held the *Lisi* ticket legally inadequate under the Warsaw Convention. In refusing to grant certiorari in *Berguido*, this Court must have reasoned that despite the fact that four Justices would necessarily hold the ticket in *Berguido* inadequate, the grant of certiorari would only eventuate in an equally divided Court and therefore an affirmance in *Berguido* would create the following grotesque result.

In *Lisi* an equal division affirmed a holding that the ticket was legally inadequate. But in *Berguido* an equal division would apparently affirm a holding that an *even more* defective ticket is legally adequate. Therefore this Court must have denied certiorari here to avoid both the appearance and substance of different results on the same important question.

This Court's apparent concern was groundless, and here is the error which must be corrected by a grant of this petition and of certiorari: unlike *Lisi,* an equally divided vote on the ticket issue here would not and could not be an affirmance of the Third Circuit's holding on the adequacy of the *Berguido* ticket because the Court of Appeals below expressly refused to decide that very issue. No combination of votes in this Court can affirm what has never been decided below.

This is how the majority of the Court of Appeals for the Third Circuit refused to decide the crucial Warsaw ticket issue:

> "The District Court . . . as well as finding that appellee was not guilty of wilful misconduct, found that appellee was not even negligent. If this conclusion is supportable, it is final and there is no need for us to examine appellant's legal contentions concerning Article 3(1) of the Convention [which specifies the requirements of a Warsaw ticket] . . ."[2]

As the majority opinion below demonstrates, the ticket issue was never decided in this case despite our submission of the ticket issue below and despite our briefing and oral argument upon it there. Petitioners are entitled to have that issue decided.

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2. *Berguido v. Eastern Air Lines, Inc.,* 369 F. 2d 874, 879 (C. A. 3, 1966). 36 *U. S. Law Week* 3373 (3/26/68) is other confirmation that the ticket issue was not decided below.

In view of the fact that the pivotal ticket issue is still not adjudicated, the grant of certiorari and a decision on the merits here would be neither an exercise in futility nor the prelude to a contradictory result when compared with *Lisi*.

Petitioners could not know of the even division of this Court in the *Lisi* case until after the decision. Therefore they could not know of the "controlling effect" of the "intervening circumstance" of Mr. Justice Marshall's refusal to sit in *Berguido* until after the decision in *Lisi*. This petition for a rehearing in all its aspects therefore meets the requirement of Rule 58, paragraph 2 of this Court.

**B. The Delivery of an Inadequate Ticket Imposes Absolute Liability on the Carrier Under the Warsaw Convention.**

The ticket in *Lisi* and the ticket here are indistinguishable save that the ticket here was both less legible and said even less about the limitations of the Warsaw Convention than the ticket in *Lisi*. Both cases, therefore, put the same question: were these tickets adequate to satisfy the requirements of the Warsaw Convention? This Court proceeded as if it intended to follow Solicitor General Griswold's recommendation to let the disposition of *Berguido* turn on the outcome in *Lisi*. The Court clearly followed his recommendation, for although it disposed of many other petitions for certiorari filed after *Berguido's*, it withheld decision on our petition until the day *Lisi* was decided. On that day, despite the Court's obvious recognition of the identity of issues between *Lisi* and *Berguido*, it also denied our petition for certiorari. We believe that it was the Court's concern for the consequences of an equal division in *Lisi* which led to the denial of certiorari in the case at bar.

If burgeoning appellate litigation[3] on the Warsaw ticket issue proves anything, it proves what we unsuccessfully argued below: A Warsaw case cannot be adjudicated without resolving the ticket issue. Upon the resolution of that issue depends the entire question of the rights of the parties to Warsaw litigation. That is why the first Warsaw case ever heard by this Court involved the ticket issue. It is also why so many of this Court's questions in the oral argument of *Lisi* were concerned with the effect of a legally inadequate ticket.

To make a judicial determination of how the Warsaw Convention operates in any case, there must be a determination of whether a ticket is adequate. But rather than do what *Lisi* now demonstrates must be done, the lower court here expressly refused to decide that very issue. Instead, it forced upon the Convention an interpretation which destroyed petitioners' rights by treating the ticket question as though it did not matter at all in the absence of a plaintiff's proof of the carrier's fault. That is manifest error. The Warsaw Convention allows of no such construction. If a ticket is inadequate, considerations of negligence or wilful misconduct are completely irrelevant. The Solicitor General agrees.[4]

Whether or not a ticket is adequate is the indispensable key to whether or not a carrier may invoke the extraordinary defenses created by the Convention. If the ticket is inadequate, we submit that the language of the Convention is pellucid: the carrier is denied all its Warsaw defenses and issues of negligence, wilful misconduct or any other species of fault are irrelevant. Yet it was exactly on the alleged absence of negligence or wilful misconduct that the petitioners' rights were destroyed below.

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3. See, for example, *Egan v. Kollsman Instrument Corp.*, 21 N. Y. 2d 160, 234 N. E. 2d 199 (1967).

4. Solicitor General's Memorandum for the United States as *Amicus Curiae* herein.

We believe that the language and the history of Article 3(2) justify our view of the Convention. The Solicitor General, too, agrees that the lower court's view of Warsaw is wrong. Before the rising tide of Warsaw litigation further burdens the trial and appellate courts of the nation, we deeply believe this Court ought to say just that. It ought to say it here, for this case raises the issue of Warsaw interpretation decisively.

## III.

## MR. JUSTICE MARSHALL SHOULD PARTICIPATE IN THE CONSIDERATION OF THIS CASE AND ALL ITS ASPECTS.

It is apparent that Mr. Justice Marshall did not participate in *Lisi* because, on May 15, 1967, while he was Solicitor General of the United States, this Court invited him to offer his views on the propriety of granting certiorari in that case. 387 U. S. 901. Before he resigned as Solicitor General a brief *Amicus Curiae* in that case was in fact prepared. Since he had thus participated as counsel in *Lisi*, 28 U. S. C. § 455 disqualified him from participation in that case as a judge.

The same consideration does not apply to the present case. The Court did not request the views of the Solicitor General in this case until November 13, 1967, 88 S. Ct. 333, after Mr. Justice Marshall had become a member of the Court. Therefore he was not disqualified by 28 U. S. C. § 455.

A number of cases have held that a judge has the duty to sit when no valid reason exists for his disqualification. This duty is every bit as strong as the duty to refuse to sit when he is disqualified: e.g., *United States v. Hoffa*, 382 F. 2d 856, 861 (C. A. 6, 1967); *Edwards v. United States*, 334 F. 2d 360, 362-3 (C. A. 5, 1964); *In re Union Leader Corp.*,

292 F. 2d 381, 391 (C. A. 1, 1961). The most cogent statement of this important policy was made by Judge Rives in the *Edwards* case, *supra,* at 334 F. 2d 362:

> "After such study as I could give the matter, I reached the conclusion that whether a judge should recuse himself in a particular case depends not so much on his personal preference or individual views as it does on the law, and that, under the law, I have no choice in this case.
>
> "It is a judge's duty to refuse to sit when he is disqualified but *it is equally his duty to sit when there is no valid reason for recusation.* Banco Nacional de Cuba v. Sabbatino, 2d Cir. 1962, 307 F. 2d 845, 860, reversed on the merits by Supreme Court on March 23, 1964, 376 U. S. 398 . . .; United States v. Valenti, D. C. N. J. 1954, 120 F. Supp. 80, 92; 48 C. J. S. Judges § 93a. If a party is dissatisfied and makes timely objection, a judge's decision to refuse to act on a case is subject to review. Medlin v. Taylor, 1893, 101 Ala. 239, 13 So. 310; 48 C. J. S. Judges 893b. The only two statutes on disqualification which I found are §§ 47 and 455 of Title 28, United States Code, neither of which would appear to have any application to my situation." [Emphasis supplied.]

Under these principles, we respectfully submit that Mr. Justice Marshall had a duty not to disqualify himself when his only reason was the fact that the present case raised the same issue as the *Lisi* case.

There is no legal basis for a judge to disqualify himself in one case simply because, as a lawyer, he had taken a position in brief in another unrelated case on the same legal issue—as Mr. Justice Marshall did in the *Lisi* case. See *McGrath v. Kristensen,* 340 U. S. 162, 176 (1950) where Mr. Justice Jackson took part in deciding an issue on which he

had expressed an opinion as Attorney General, and *In re Nevitt,* 117 Fed. 448, 452 (C. A. 8, 1902). The issue is particularly acute when the legal position was taken by the Solicitor General of the United States pursuant to the Court's request for his views as a friend of the Court.

The problems raised by Mr. Justice Marshall's failure to participate in the disposition of this petition for certiorari could not become known until the order in question was raised. Therefore, the grounds for this petition satisfy both criteria for a petition for rehearing set forth in this Court's Rule 58, paragraph 2.

We respectfully believe that Mr. Justice Marshall should have participated in the decision here. But even if that conclusion is erroneous, we are convinced that what must have been the Court's rationale for denying certiorari here was also its fundamental error. As this cause presently stands, the error has completely destroyed the rights which petitioners have struggled for more than a decade to vindicate through their unique ordeal of litigation.

The alternative to deciding the ticket issue here was clearly suggested by Solicitor General Griswold in this case. The Court followed the form of his suggestion by letting *Berguido* abide *Lisi's* outcome. It now ought to follow the substance as well. In his *Amicus Curiae* memorandum, Solicitor General Griswold proposed that: "If the Court agrees with the Second Circuit's conclusions in *Lisi* [now affirmed by a divided Court], it would appear appropriate to remand the instant case for reconsideration in light of that decision . . .". As a minimal relief, we respectfully submit this ought to be done on a remand which commands the Court of Appeals for the Third Circuit to decide the issue of the adequacy of the ticket in this case.

There would be no reason whatsoever for Mr. Justice Marshall to disqualify himself on this issue for he would not be deciding the adequacy of the ticket but merely decid-

ing whether the Court of Appeals should be ordered to decide the adequacy of ticket.

Finality in litigation is a good only so long as it is not purchased with the coin of an unjust result. *Gondeck v. Pan American World Airways, Inc.*, 382 U. S. 25, 86 S. Ct. 153 (1965). There is absolutely no justification for having the ticket in *Lisi* and the ticket here yield different results except for the seemingly potential embarrassment which might arise from an evenly split decision in each case. But as we have shown, that possibility does not in reality exist here because neither an equal division nor any other distribution of votes here can affirm what had to be—but never was—decided below.

## CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Third Circuit.

Respectfully submitted,

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*Of Counsel:*
SEYMOUR I. TOLL.

## CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58, Paragraph 2 of the Rules of this Court.

SEYMOUR I. TOLL,
*Counsel for Petitioners.*

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IN THE

# Supreme Court of the United States

October Term, 1967.

## No. 528.

MARION J. BERGUIDO, Individually, Marion J. Berguido, Robert G. Rowe and Warren H. Woodring, Executors of the Estate of CARLOS BERGUIDO, JR., and June Berguido, Joy Berguido, Jill Berguido and Carlos Berguido, 3rd, by Their Guardian, Marion J. Berguido,

*Petitioners,*

*v.*

EASTERN AIRLINES, INCORPORATED,

*Respondent.*

## MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI AND PETITION FOR SUCH REHEARING.

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**Motion for Leave to File Second Petition for Rehearing of Order Denying Writ of Certiorari and Petition for Such Rehearing.**

MARION J. BERGUIDO, Individually, Marion J. Berguido, Robert G. Rowe and Warren H. Woodring, Executors of the Estate of Carlos Berguido, Jr., and June Berguido, Joy Berguido, Jill Berguido and Carlos Berguido, 3rd by their Guardian, Marion J. Berguido, Petitioners, respectfully move for leave to file a second petition for rehearing of an order denying writ of certiorari and represent as follows:

1. That they are the petitioners in No. 528, October Term, 1967 in this Honorable Court in which action their petition for certiorari was denied and their petition for rehearing of that order denying the writ of certiorari was also denied on Monday, May 6, 1968.

2. This case involves the effect and significance of the failure of a commercial airline to provide an adequately informative legible passenger ticket in an international flight which by the requirements of Chapter 2, Article 3(1) of the Warsaw Convention must give to the passenger instant notice and understanding of the financial limitations of the Warsaw Convention as well as stating specifically how many stops and where the plane proposes to make them so that the passenger is fully aware of the risks to which he is being submitted. This is of the greatest importance since most crashes occur on take-off or landing.

3. To the extent that this case and *Alitalia-Linee Aeree Italiane, S. P. A. v. John Lisi,* October Term, 1967, No. 70 decided on March 25, 1968 by an equally divided court with Mr. Justice Marshall not participating because as Solicitor General he was on a memorandum for the United States as amicus curiae, discuss the question of the effect of small print on a ticket, they are identical and indistinguishable.

4. The net result of the court's rulings in *Lisi, supra* and the instant one is that faced with precisely the same legal question in both cases, the passenger in *Lisi, supra* which came here from the United States Court of Appeals for the Second Circuit will prevail, whereas the widow and children of the passenger in the instant case (*Berguido*) out of the Third Circuit will be denied any recovery for their innocent decedent's death. All fairminded men must viscerally react most severely to such patently unfair diverse results. Both should win or both should lose.

5. In our original Petition for Rehearing at page 6 we vigorously argued that there was no reason why *Berguido* (instant case) should not have been heard and considered separately since in this case Mr. Justice Marshall at no time and in no way participated therein and therefore was free to and should have acted to help resolve this issue presented by both cases—a result not attained by *Lisi*. We cited in support thereof *United States v. Hoffa*, 382 F. 2d 856, 861 (C. A. 6, 1967); *Edwards v. United States*, 334 F. 2d 360, 362-3 (C. A. 5, 1964) and *In re Union Leader Corp.*, 292 F. 2d 381, 391 (C. A. 1, 1961).

6. In that same Petition for Rehearing we brought to the Court's attention the fact that in the instant case the United States Court of Appeals for the Third Circuit *considered but did not decide* the ticket issue involved in both cases because it went off on a completely erroneous understanding of the way that the Warsaw Convention works when it said:

> "The District Court . . . as well as finding that appellee was not guilty of wilful misconduct, found that appellee was not even negligent. *If this conclusion is supportable, it is final and there is no need for us to examine appellant's legal contentions concerning Article 3(1) of the Convention* [which specifies the require-

ments of a Warsaw ticket] . . . ." 369 F. 2d 874, 879 (C. A. 3, 1966). Emphasis supplied.

That the Third Circuit did not decide the ticket issue is confirmed in 36 Law Week, 3373 (3/26/68). On its face that holding was wrong. The Solicitor General of the United States agreed with us and so told this Court in his memo in this case to this Court and recommended remand.

7. In our Petition for Rehearing of the order denying the writ of certiorari, this family did not ask that this court decide that issue by granting certiorari to resolve this issue then and there. It only requested that this court remand the case back to the Third Circuit so that the petitioners would at least be allowed their absolute right to have the critical ticket issue in the case ruled on by the Court of Appeals. Certainly that is a right which is not similar to the rule governing certiorari where this Court may decide in a particular case that as a matter of judicial discretion it is not timely or important to hear it then. This absolute right to a ruling on the critical ticket issue by the Court of Appeals however is different and it has been denied to your petitioners. It never reached it. And this was due to its complete miscomprehension of the Warsaw Convention itself and how it works.

8. When *Lisi, supra* was argued before this Court on March 11, 1968, the issue before the court was the adequacy of the ticket involved in *Lisi, supra.* But the bland statement of the issue does not reveal its true nature. The question must be broken down into its component parts. This Court thought so too. Practically every member of this Court, from the bench peppered counsel with questions in respect to the several phases of the general question on

which the adequacy of the ticket may turn. This Court wanted to know the following:

(a) Was the ticket defective because it was printed in such a manner that it was illegible; and

(b) Was the ticket defective because it did not comply with Chapter 2, Article 3(1c) of the Warsaw Convention in respect to whether the ticket contained on it the agreed stopping places; and

(c) Was the ticket defective because it failed to tell the passenger in plain simple language that the financial limitation of damages under Warsaw was $8,350 and hence was a mere reference in the ticket to the Convention in general terms sufficient.

Only counsel for the passenger in *Lisi* was permitted to argue the viewpoint of passengers under Warsaw tickets.* He decided as a strategy move that he should take a calculated risk and limit this Court's consideration of the adequacy of the ticket in his case to a determination of whether the ticket was legible or not.** The Court's hands having been so tied by counsel, the court reviewed only the legal effect of using the small print on the tickets.

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* Your petitioner had sought before the disposition of the Writ of Certiorari in No. 70 [Lisi] to consolidate their case with *Lisi*, so that they could prevent the foreclosure of step by step analysis of each of the aforementioned components of the adequacy of the ticket issue which counsel in *Lisi* succeeded in attaining as part of his appellate strategy. It was denied. Your petitioners were thus deprived of their right to have their own counsel state their view of *all* these points of law which their ticket raised. Being thus estopped by Counsel for *Lisi*, the Court never reached those issues and heard from no one about them. They still await decision.

** Naturally airline counsel was delighted to agree to such a narrowed consideration of the adequacy issue.

Various members of this Court from the bench commented that they could physically read the ticket. On *that* issue solely and alone, this Court split evenly. It never reached (b) and (c) *supra,* raised by us in our Petition for Certiorari because it was foreclosed by *Lisi* counsel from doing so. But your petitioners in this case have always considered (b) and (c) of overriding importance in this case and therefore briefed them in detail. In the instant case the ticket involved did not contain a warning that this plane was going to make a stop at Jacksonville, Florida, the very place where the accident occurred, in complete violation of Article 3(1c). Thus petitioner's decedent's risk of an accident was increased *unilaterally* by thirty-three and one-third (33⅓) per cent. In our case the ticket contained no warning whatsoever that it was controlled by a limitation of $8350 or of any particular amount under the terms of the Warsaw Convention. We are confident that had the four justices of this Court who ruled against the passenger in *Lisi* had a chance to decide the effect of these other inadequacies (b) and (c) of the ticket, that there would have been a unanimous decision that in those respects a ticket so delivered did not comply with the Convention. Those points remain to be decided. Indeed even the effect of illegible print on a ticket is not actually decided by *Lisi.* It has been held that a decision of an evenly divided court decides nothing.

Obviously by granting Certiorari in *Lisi* this court showed that it thought that the problems generated by Warsaw Convention tickets in international air flight needed review at this time. But unfortunately *Lisi* decided nothing. The same need remains unresolved. It is only fair therefore that *Berguido* [instant case] be remanded to the Third Circuit for decision so that it may in due course after consideration there, return here when all the major

questions present in Warsaw litigation can be properly and totally considered and decided. *Berguido* raises all of them.***

*** The abortive certiorari granted and argument thereon in *Lisi* has proven fruitless. None of the basic points of law in Warsaw which prompted grant of certiorari were resolved. They still await decision. The need is still unfulfilled. Perhaps the result in *Lisi* is, we respectfully submit, a happy one for it was a poor case for consideration by the Court in the posture in which it came before the Court. Counsel for the passenger had tied the Court's hands by the narrowness of the area on which he sought review. A far more nutritive case is *Berguido* [instant case]. It raises each and every fundamental point of law which Warsaw can present, with the exception of whether charter flights are within the scope of Warsaw. That problem will be taken care of in *Block v. Compagnie Nationale Air France,* 229 F. Supp. 801 (D. C. N. D. Ga. 1964) U. S. S. Ct. docket #1089, March 25, 1968 in which this Court has recently asked for the views of the Solicitor General. Here are the points that *Berguido* directly raises and on which petitioner's counsel seeks resolution:

1. If the ticket is inadequate, is there not absolute liability on the carrier without regard to proof of negligence or wilful misconduct?

2. Is a ticket inadequate in which the print is too small to read?

3. Assuming that the print on the ticket is legible, is it not also required that the attempted limitation of damages under Warsaw be printed not merely legibly, but also in emphasis so as to attract attention to the limitation by putting it in larger print or by off-set printing or different coloring? See *Maize v. Atlantic Refining Co.,* 352 Pa. 51, 55, 41 A. 2d 850, 160 ALR 449.

4. Is not a ticket which merely states that it is subject to the limitations of the Warsaw Convention inadequate because it does not state specifically in dollars just what the limitation is? See *Lachs v. Fidelity & Casualty Co. of New York,* 306 N. Y. 357 (1954).

5. Is not a ticket as a matter of contract law inadequate which fails to comply with the requirement of the Convention that "agreed stopping places" be specifically noted thereon? Must not there be a bilateral agreement before the passenger can be subjected to the greater risk of harm when a not scheduled extra stop is made? After all most crashes occur on take-off or landing.

The Berguido family should not be cast off into forgotten limbo never to be heard, while the controlling issues await a new case some day in the future for resolution where they, but not the Berguidos, may receive their just due. *Berguido* is in point of time the next case docketed in this Court raising these issues. It is entitled to become the deciding case since no decision can be reached in *Lisi* due to the posture of the legal problems presented and the prior connection of Mr. Justice Marshall with it. Hence *Berguido* should not be passed over.

The present status of these two cases (*Lisi* and *Berguido*) must and does leave fairminded men with a gnawing inward sense of shock at its patently unfair posture. It is not right that the passenger in *Lisi* can win and the passender in *Berguido* must lose. This just cannot be due process.

WHEREFORE the petitioners respectfully submit that the learned Judges of the Court of Appeals for the Third Circuit in its decision of this case, 369 F. 2d 874 (1966) did eroneously and/or intentionally and/or arbitrarily refuse to consider and decide the basic question directly and inextricably involved in this case, to wit: the effect of an inadequate Warsaw ticket so as to render it a non-compliance with the delivery clauses of the Warsaw Convention. They do therefore pray that this Petition and Motion be granted and that certiorari be granted and the case be remanded to the United States Court of Appeals for the Third Circuit with specific directions that they consider and decide these important and pressing points of law which prompted this Court to grant certiorari in *Lisi, supra.*

Respectfully submitted,

B. N. RICHTER,
*Attorney for Petitioners.*